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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 17, 2009

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 17h
day of April, 2009, between the hours of 9:01 a.m. and
5:01 p.m., at the Texas Association of Broadcasters, 502
E. 11th Street, Suite 200, Austin, Texas 78701.

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Documents referenced in this session

09-9	SB 445, Updated version
09-10	Revised Draft of TRCP 265.1
09-11	TAMES, TRAP amendments
09-12	Proposed Amendments to TRCP 556 and 557

1 *-*-*-*

2 CHAIRMAN BABCOCK: All right. Good morning,
3 everybody, on a rainy Friday morning in Austin. We are
4 now in session, and as usual Justice Hecht will open it up
5 and tell us some things about what the Court is doing.

6 HONORABLE NATHAN HECHT: Not much has
7 changed since our last meeting. The Legislature is
8 considering a number of bills that impact our work here.
9 Notably, Senate Bill 445 --

10 MS. PETERSON: Yes, 445. Juror question and
11 note-taking.

12 HONORABLE NATHAN HECHT: -- that pertains to
13 the juror questions and note-taking, which we'll start
14 with here directly, and that bill has passed the Senate
15 and is pending in the House, pending in the House
16 committee. There are a number of other bills over there
17 that affect the judiciary in different ways, and but I
18 won't take time to report on all of those. Yes, there is
19 a House Bill 2702, which is a bill by Representative
20 Dunnam that would affect the work of this committee and
21 require that we report only once every two years and
22 during the legislative session, but I don't know how much
23 support that bill has, but it's pending in a House
24 committee, too, no counterpart in the Senate. So that's
25 kind of a brief synopsis of that, and I don't think we

1 have anything else to tell you about.

2 I welcome my colleague, Justice Wainwright
3 this morning, whom the Court sent over to keep track of
4 me, so I hope I get a good report, and anything to add to
5 that, Justice Wainwright?

6 HONORABLE DALE WAINWRIGHT: No, sir.

7 HONORABLE NATHAN HECHT: All right. Good,
8 so that's all we've got.

9 CHAIRMAN BABCOCK: All right, great. Well,
10 Judge Christopher is back with some notes for us to answer
11 and a report on the amended bill and the revised proposed
12 rule.

13 HONORABLE TRACY CHRISTOPHER: If I could
14 find my copy of it, it would be helpful. I have been in a
15 long trial, and the parties agreed to do juror questions,
16 so there -- I think Angie brought some for you to look at
17 if you're kind of interested to see what kind of questions
18 I got in the case. It was a pretty complicated -- is a
19 pretty complicated breach of contract, tortious
20 interference case involving coal bed methane in Bulgaria,
21 and the juror questions were very interesting. Most I
22 asked without objection. There were a few that were
23 objected to and sustained, and there were a few that
24 appeared to be kind of advocate type questions rather than
25 just sort of informational type questions, but even those

1 the lawyers didn't object to, so -- and, you know,
2 sometimes they were advocates one way, sometimes they were
3 advocates the other way, so both sides said they liked the
4 process. They don't know the results of the verdict yet
5 because the jury is still deliberating. Someone is going
6 to take the verdict for me this afternoon if they come in
7 this afternoon, so those are available for you to review.
8 We have made some small changes.

9 CHAIRMAN BABCOCK: Judge?

10 HONORABLE NATHAN HECHT: Judge, may I ask a
11 question? Did the lawyers mention the jury question
12 procedure in voir dire?

13 HONORABLE TRACY CHRISTOPHER: This case has
14 sort of an odd history, and I've told my --

15 CHAIRMAN BABCOCK: Objection, nonresponsive.

16 HONORABLE TRACY CHRISTOPHER: I didn't do
17 voir dire. Judge Mike Miller did voir dire, and Judge
18 Mark Davidson made all the Daubert rulings in the case.
19 So, you know, my feeling is if I get reversed, all three
20 of us have gotten reversed in this case, but although I
21 guess I'm sort of the last chance on the case. I didn't
22 actually do voir dire. Judge Miller's father had been in
23 the hospital, he thought he was going to get better, he
24 took a turn for the worse, so I stepped in to start the
25 trial, so I don't know. Sorry.

1 CHAIRMAN BABCOCK: Who are the lawyers?

2 HONORABLE TRACY CHRISTOPHER: Fred Higgins
3 for the plaintiffs and Mitchell Madden from Dallas
4 represents one of the defendants and then Oncken & Uzick
5 from Houston representing some of the other defendants,
6 and I mean, at the end of the trial we were talking about
7 it, and they all seemed to enjoy the process. It was
8 time-consuming, but the whole case was long, so no one
9 seemed to mind the extra time that it took, which kind of
10 supports my view that it's probably better in longer,
11 complicated cases and probably unnecessary in a lot of the
12 short trials that we do on a routine basis but, you know,
13 still might be useful in the shorter trials.

14 CHAIRMAN BABCOCK: How long was the case,
15 Judge?

16 HONORABLE TRACY CHRISTOPHER: This is our
17 fourth week.

18 MR. SCHENKKAN: Were there any questions
19 that were asked that really, you know, suggested that the
20 jurors saw things or were confused about things that you
21 wouldn't have anticipated them to be confused about?

22 HONORABLE TRACY CHRISTOPHER: Yes. I mean,
23 and really, they came up with some very good questions
24 that the lawyers hadn't anticipated at all, so it wasn't
25 even just sort of a clarification. It was kind of a whole

1 other line of testimony that hadn't been elicited from the
2 witness, and the lawyers were like, wow, yeah, you know,
3 we're glad to have that put on the table. So, I mean,
4 even though our instruction that I gave them said "to
5 clarify" -- no, I changed it to "about." I think that was
6 the -- so the actual form we said was "about the witness'
7 testimony," so they did actually kind of go off a little
8 bit and asked things that the lawyers hadn't thought to
9 ask at all.

10 For example, the plaintiff's expert was on
11 the stand, Pete Huddleston, and let's see, I'm not sure if
12 we have that set of questions here or not. We do. One of
13 the questions that they asked him was whether his company
14 would have been willing to invest in this project, and
15 nobody objected to it. It's not something that people
16 would have normally thought to ask the hired expert about,
17 you know, a project. You know, it could have been
18 objected to as speculative, but no one did, and so we
19 asked, and he gave a very interesting answer that might
20 have hurt the plaintiff, but we'll see.

21 MR. MEADOWS: How old is Pete Huddleston?

22 HONORABLE TRACY CHRISTOPHER: He's old.
23 Seventy something.

24 HONORABLE TOM GRAY: That's not old at all.

25 MR. MEADOWS: Tracy, how many of the jurors

1 took advantage of the process?

2 HONORABLE TRACY CHRISTOPHER: Well, I didn't
3 know because we sent them back to the jury room each time.
4 It worked out better that way. We were kind of tired
5 anyway and needed a break, so we sent them back to the
6 jury room. They wrote the questions. They actually then
7 took a break while we were going over them on the record
8 to make our objections to them. It looks like from the
9 handwriting I had four or five jurors that were routinely
10 asking questions of the 13, which is another sort of
11 interesting thing because we did have an alternate, and I
12 didn't pay attention to whether the alternate was asking
13 questions or not, so, yeah.

14 MR. MUNZINGER: Was your jury panel a
15 typical Houston jury or was it -- having looked at some of
16 these questions they seem to be incisive in a number of
17 cases, reflecting a good deal of sophistication in some
18 areas, and it struck me is that a typical panel in your
19 perception?

20 HONORABLE TRACY CHRISTOPHER: The answer to
21 that is it depends. If the lawyers believe that the
22 jurors with higher education are going to be good for
23 their case, they keep them on, and there are enough in our
24 jury pool that if both sides agree to that, you can get a
25 lot of jurors with, you know, college education.

1 Sometimes, though, both sides think that's not an
2 advantage to them, even in a complicated case, and you can
3 end up with, you know, everybody with high school or GED
4 or not quite high school. So, I mean, the pool that comes
5 to us is generally big enough to kind of get skewed either
6 way depending on the lawyers' picks, peremptory strikes,
7 if they think education level is important.

8 (Mr. Fuller begins speaking.)

9 THE REPORTER: I can't hear you.

10 CHAIRMAN BABCOCK: You've got to speak up.

11 MR. FULLER: Were any of the questions
12 directed at matters that had been limined out?

13 HONORABLE TRACY CHRISTOPHER: No. And they
14 asked a few legal questions that -- like one asked to
15 define "tortious interference," and so we didn't let the
16 witness do that, so -- although one of the smoking gun
17 memos in the case said, "We need to be concerned about
18 tortious interference in this case."

19 CHAIRMAN BABCOCK: Whoa.

20 HONORABLE TRACY CHRISTOPHER: It's possible
21 you could have asked the author of that memo what he meant
22 by that, but --

23 CHAIRMAN BABCOCK: When they went back into
24 the jury room were you concerned that they would all get
25 together and say, "Hey, let's ask this, let's ask that,"

1 and they just had a scrivener?

2 HONORABLE TRACY CHRISTOPHER: No. They have
3 been a very good jury, especially considering the fact
4 that they were told it was only going to be three weeks
5 and we're into the end of four and probably five, so they
6 have taken it very seriously. In fact, like the door to
7 the jury room was open while people -- because, like, I
8 would go back there and -- because jurors who didn't want
9 to ask a question were just on break versus the ones who
10 were taking their time to write them. I think one of
11 those jurors wrote 12 questions, so, I mean, it did take a
12 while for the juror to sit down and come up with all of
13 those questions, and I do have quite a few jurors that are
14 taking a lot of notes in this case, so obviously to ask
15 this kind of detailed question that some of them have been
16 asking, I mean, because we have had witnesses on the stand
17 for several days before the jurors actually got to ask a
18 question of the witness.

19 HONORABLE TERRY JENNINGS: How long did the
20 procedure take? You know, for example, on the worst case
21 where the person asked a number of questions versus, you
22 know, somebody just asking a simple question?

23 HONORABLE TRACY CHRISTOPHER: Well, every
24 witness that -- we had a lot of depositions in the case, so we
25 didn't really have any non -- you know, sort of minor

1 witnesses. Every witness that we had was I would consider
2 a major witness in the case, and so as a result it
3 probably took 10 to 15 minutes for them to write out their
4 questions and give them to us, took us about 5 to 10
5 minutes to put them on the record, and do objections to
6 them because I read them all into the record and, you
7 know, all the parties would say, you know, "no objection"
8 to it and then 5 to 10 minutes to read the questions.

9 Well, maybe even more than that. Maybe 20,
10 25 minutes to actually read the questions and have the
11 witness answer them. So that's why I'm saying it was
12 time-consuming. Maybe an hour total, and we didn't do --
13 no one did follow-up questions after it, so that was kind
14 of interesting, too. They just decided they would just
15 leave it with what the witness had testified to.

16 HONORABLE TERRY JENNINGS: How did you feel
17 about the extra time? Was it something you were
18 enthusiastic about? Did it bother you? Was it okay?

19 HONORABLE TRACY CHRISTOPHER: You know, I
20 took the case when they told me it was going to be a
21 three-week case, so the fact that it's sort of morphing
22 into a five-week case is -- you know, like I really wanted
23 to come today, and so we worked really hard to close so I
24 could get here today, and I had to really convince the
25 lawyers that it was okay for another judge to take the

1 verdict this afternoon, so but I really thought it was
2 good for the jurors because of the nature of this case.
3 So, yes, it was time-consuming, but given the fact that
4 some of these major witnesses were, as I said, on the
5 stand for 12 hours, an extra hour really didn't seem that
6 terrible and I thought was useful.

7 CHAIRMAN BABCOCK: Yeah, Carl.

8 MR. HAMILTON: Did the jurors ask or write
9 their questions there in the jury box, or did they go back
10 to the jury room?

11 HONORABLE TRACY CHRISTOPHER: Back to the
12 jury room. I thought it was an easier process, and it
13 worked out well in terms of timing for a break, too,
14 because while they were writing the questions the lawyers
15 and I would hit the restroom, and we would get them from
16 them and go over them. Fortunately I didn't have any
17 smokers in terms of the lawyers, because that always is an
18 issue just in terms of giving people their nicotine break.

19 HONORABLE TERRY JENNINGS: So some of this
20 would have been break time anyway.

21 HONORABLE TRACY CHRISTOPHER: Right. Right.
22 But it did make it a little more stressful for the lawyers
23 and for me because it wasn't a real 15-minute break. I
24 mean, we had enough time to run to the restroom, come
25 back, and then start going over the questions. So, you

1 know, to the extent they lost their ability to prepare for
2 the next witness or, you know, have 10, 15 minutes of down
3 time and I did, too, so --

4 CHAIRMAN BABCOCK: Judge, one final question
5 from me anyway. If you had been trying this case, would
6 these questions have changed your strategy about how you
7 tried it?

8 HONORABLE TRACY CHRISTOPHER: Well, my staff
9 and I all thought that the questions seemed to be favoring
10 the defense side of the case, but the jury has been
11 deliberating for eight hours, so I can't really tell at
12 this point. You know, if I had been the defendant maybe
13 and I'd heard some of those questions, maybe I would have
14 thought, you know, things are looking pretty good for me,
15 I'm going to jettison recalling some of my witnesses.
16 Now, I don't think they actually -- as best I can tell
17 there were two depositions that were only about an hour
18 each that they had planned to call that they didn't call;
19 but whether they had planned to recall some of the key
20 witnesses that, you know, we heard three weeks ago and as
21 a result of the jury questions they decided not to, I'm
22 not sure.

23 MR. SCHENKKAN: I was going to ask kind of
24 the same question in a different way. Did the questions
25 or the answers play into the lawyers' closing arguments

1 that you could see, the focus --

2 HONORABLE TRACY CHRISTOPHER: Yes, and that
3 actually was something that I might want to put sort of in
4 my own standard motions in limine. Pete Huddleston, for
5 example, because he was an expert had actually sat in and
6 heard questions of a previous witness, questions from the
7 jury and our discussion about it, and at one point he
8 said, "This is a smart jury. I heard the questions they
9 asked of the other witness." Okay. Now, you know, Pete
10 might have said that anyway, "This is a smart jury and I
11 trust them to make the decision" because that's kind of
12 the way he testifies, but that was an extra little
13 pandering to the jury I thought by, you know, commenting
14 on, you know, the fact that they had asked smart
15 questions, and then in closing a couple of the -- I'm
16 trying to think. I think both sides mentioned a question
17 that the jury had asked, and I'm not sure I liked that,
18 but, I mean, they both did it, so -- but it might be
19 something that in the future I would say, you know, a
20 question is a question, and we shouldn't be talking about
21 the fact or we shouldn't emphasize the fact that it was a
22 question from the jury.

23 But, I mean, that's part of a natural trial
24 strategy also, because, you know, it's not unusual in
25 closing argument for, you know, the defense lawyer to say,

1 "Plaintiff's lawyer asked this question and got this
2 terrible answer," you know, to sort of emphasize that it
3 was the other side's question who elicited this testimony,
4 just to kind of make it seem -- to emphasize it more,
5 so -- but it worried me a little bit that they were
6 talking about a juror question instead of counsel's
7 question in terms of a tactic in closing argument.

8 HONORABLE DALE WAINWRIGHT: About the
9 procedure, were there instructions to the jury about how
10 many of them had to agree before the question could go
11 out?

12 HONORABLE TRACY CHRISTOPHER: Oh, no. No.
13 These were all individual questions. Yeah, everybody
14 wrote down their own questions, and they're specifically
15 told "Don't talk to the other jurors about your
16 questions." So they went back, they -- like I said, I
17 would see them in there working on their questions, and it
18 was all -- it was very quiet, and nobody was discussing
19 what question they should ask.

20 HONORABLE DALE WAINWRIGHT: And then they
21 all went to you to review before and make the decision
22 whether to ask.

23 HONORABLE TRACY CHRISTOPHER: They came to
24 me. I read them out loud. The lawyers objected or not,
25 and if they didn't object, I read it.

1 HONORABLE DALE WAINWRIGHT: I realize you
2 don't have a verdict and this calls for a little bit of a
3 prediction, but would the dispute presented to the jury
4 have been materially different? I mean, would the jury be
5 able to reach the right outcome in your opinion without
6 the questions that were asked, or did the questions add
7 materially to the sufficiency, legal sufficiency review or
8 the factual sufficiency review, of what they would have
9 done?

10 HONORABLE TRACY CHRISTOPHER: I don't know
11 if I can answer that truthfully. A lot of them were
12 simple clarification issues, you know, "what does this
13 mean," "what does that mean," so but none of them -- like
14 for example, one juror asked, "What is due diligence,"
15 okay, which was a term that had been used quite a bit
16 during the testimony. Well, did all 12 of them not know
17 what due diligence was or understand it from the
18 testimony, or was it only just that one juror that didn't
19 understand it? So, I mean, due diligence is kind of a key
20 issue in the case, you know, what that means, what you do
21 during a period of due diligence, but I'm not sure whether
22 the other members of the jury wouldn't have understood it
23 just based on the testimony and, therefore, during
24 deliberations when they were all discussing it would be
25 able to explain it to the juror who didn't understand it.

1 So it's just really hard for me to tell, but
2 I mean, it seemed to me that every question that was
3 asked, no one was unhappy that they were getting this
4 extra information, so I don't think any of the jurors
5 looked at it as unnecessary information, and to the extent
6 it explained that concept again to all of them, it was a
7 useful question. The other questions, probably not as
8 material a question. We have a contract formation
9 question in the case because there was a contract sent,
10 plaintiff sends contract to defendant, defendant adds
11 language, sends it back to plaintiff -- signs it, sends it
12 back to plaintiff, plaintiff says he signed it, but we
13 don't have plaintiff sending it back to defendant. Or no
14 one can find any evidence that plaintiff sent it back to
15 defendant signed.

16 So there were a lot of pointed questions of
17 the plaintiff about that. You know, "What happened to
18 it?" And the plaintiff is a lawyer, and so that was kind
19 of a funny thing because the jurors are like "You're a
20 lawyer. Why didn't you pay better attention to this
21 important contract that you're now suing on?" And so
22 those were the sort of questions that were a little more
23 advocate type, but, yeah, a little argumentative, but it
24 was obviously something that bothered at least two of
25 them, that the plaintiff was a lawyer and wasn't taking

1 good care of his contractual, you know, obligations. So,
2 again, that's a pretty key issue in the case, but I'm not
3 really sure whether the juror questions about it would
4 have materially changed the outcome.

5 CHAIRMAN BABCOCK: Bobby.

6 MR. MEADOWS: Just something you said a
7 moment ago struck me as a concern in this -- in the manner
8 of argument, because seeing notes from the jury does give
9 you a sense of what the jury is thinking and perhaps what
10 leaders on the jury are thinking. If you've got several
11 notes, 11 notes coming from a particular juror, it
12 wouldn't be surprising if that juror would be a leader,
13 maybe the foreperson.

14 HONORABLE TRACY CHRISTOPHER: But I don't
15 think that's the case.

16 MR. MEADOWS: May not be.

17 HONORABLE TRACY CHRISTOPHER: Because I know
18 who the presiding juror is, and I don't know for sure, but
19 he never took a note, and he's the presiding juror, and I
20 think the people who took notes are the ones who asked the
21 questions. But I don't know a hundred percent.

22 MR. MEADOWS: But don't you -- wouldn't you
23 still agree that it's -- it gives lawyers insight into
24 what at least some of the jurors are thinking and what
25 they care about, and to be able to speak directly to those

1 jurors in argument is something that is not part of the
2 practice now.

3 HONORABLE TRACY CHRISTOPHER: That's true,
4 it's not. I mean, I think it does add a different
5 dimension to the trial, you know, whether that's good or
6 bad. I mean, I think it does obviously give you
7 information into what some of the jurors are thinking.

8 CHAIRMAN BABCOCK: Harvey, then Justice
9 Gray.

10 HONORABLE HARVEY BROWN: Have you had more
11 questions during deliberations about the jury charge than
12 normal or the same?

13 HONORABLE TRACY CHRISTOPHER: Less.

14 HONORABLE HARVEY BROWN: Less. Interesting.

15 CHAIRMAN BABCOCK: Justice Gray.

16 HONORABLE TOM GRAY: I was going to follow
17 up on what --

18 HONORABLE TRACY CHRISTOPHER: But I used our
19 new how-to-answer-the-verdict certificate, so we'll see.
20 We'll see if that keeps the, you know, "we've got 10 here,
21 we've got 11 here, how do I sign this again," and because
22 we have a malice question, which has to be unanimous,
23 we've got the additional verdict certificate, too, so
24 we'll see.

25 HONORABLE TOM GRAY: I was going to

1 follow-up on what Bobby was asking about and remind
2 everybody of what Tommy talked about last week, is that he
3 found out that it was one juror in the case that was
4 asking the questions, and so the lawyer that materially
5 changes his trial strategy based upon those questions
6 coming out of the jury room does that at his own peril,
7 that he may wind up only talking to one juror, and you
8 know, that's just a -- it is, as Judge Christopher pointed
9 out, it adds a different dimension, but it's not
10 necessarily a -- you know, an arrow that's going to lead
11 you through to your verdict.

12 HONORABLE TRACY CHRISTOPHER: And I will say
13 that no one asked me to actually see the questions, so I
14 just read them, so there wasn't a real attempt to like
15 compare handwriting from sets of questions to see, you
16 know, which juror was asking what kind of questions. I
17 mean, you could probably do it. No one asked me for it.
18 I suppose I would have given them copies if they had
19 wanted them.

20 HONORABLE TOM GRAY: So right now you're not
21 planning on putting the actual question written by the
22 juror in the record?

23 HONORABLE TRACY CHRISTOPHER: No, no, I am.

24 HONORABLE TOM GRAY: Okay.

25 HONORABLE TRACY CHRISTOPHER: In fact, I did

1 this little cover sheet and filed them as one document, so
2 all the questions of the witness were attached, so, yeah,
3 I mean, they're all in the record there.

4 HONORABLE TOM GRAY: But was there any
5 objection to you asking the questions?

6 HONORABLE TRACY CHRISTOPHER: No.

7 HONORABLE TOM GRAY: As opposed to --

8 HONORABLE TRACY CHRISTOPHER: That's the way
9 Judge Miller had explained the process to the lawyers, and
10 they were all fine with that.

11 CHAIRMAN BABCOCK: Harvey, then Richard
12 Munzinger.

13 HONORABLE HARVEY BROWN: My question was
14 asked.

15 CHAIRMAN BABCOCK: Richard.

16 MR. MUNZINGER: In each instance the jury
17 was sent back to the jury room before the question was
18 written out. Was that because you felt that you needed
19 the break after 6, 8, 10, 12 hours on the witness stand?
20 Would you recommend that the rule that the committee
21 recommend to the Supreme Court require that the jury's
22 question be written in the jury room as distinct from the
23 jury box to preserve the anonymity of the inquiring juror?

24 Because a good deal of the discussion around
25 the table today has been if I know who's answering the

1 questions I can watch this fellow, that fellow, et cetera.
2 It changes the dynamic of the trial for me to have an
3 insight as to what a juror or several jurors may be
4 thinking, and as the questions are asked it's very simple
5 for me to watch to see who's writing the question out and
6 passing it down. What's your thought about the need for
7 anonymity of the question?

8 HONORABLE TRACY CHRISTOPHER: Because of the
9 nature of the trial and the length that the witnesses were
10 on the stand, it just seemed natural to take a break and
11 let them go back to the jury room and do it, which, of
12 course, does preserve anonymity more. I would think in --
13 if a witness had been on the stand for an hour and you
14 just passed 12 blanks to everybody and they scribble down
15 something or not and pass it back would probably be fine.
16 So I would hate to put in the rule that you have to take a
17 break and do it in the jury room. I would just think it
18 would be better to let the judge see where they are, how
19 complicated the case is, you know, whether they think
20 there's going to be lots of questions, how long the
21 witness was on the witness stand. I mean, all of those
22 things factor into it, I think. For me, because of the
23 length that the witnesses were on the witness stand, it
24 just worked out better to do the break.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: Yeah, one of the things, I mean,
2 you might have a real important point and somebody is
3 writing, they're not paying attention. You know, I think
4 wouldn't it be better if you did wait to write the
5 question?

6 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
7 we didn't even give them this form until the witness
8 finished. So I didn't even have a bunch of them like
9 sitting in the jury box or anything so that they could do
10 it as we went along. I did think -- I agree with you, I
11 thought it was better to -- because that way you don't
12 wanting them writing a question, missing something, when
13 that question is going to get answered later anyway.

14 MR. LOW: Right, could be, yeah.

15 HONORABLE TRACY CHRISTOPHER: So I thought
16 it was actually better to just wait completely till the
17 end.

18 CHAIRMAN BABCOCK: Carl, then R. H.

19 MR. HAMILTON: I assume the jurors knew from
20 the beginning of the trial they were going to be able to
21 ask questions.

22 HONORABLE TRACY CHRISTOPHER: Yes.

23 MR. HAMILTON: And they were taking notes?

24 HONORABLE TRACY CHRISTOPHER: Yes.

25 MR. HAMILTON: So they were probably writing

1 out their questions while they were taking notes anyway.

2 HONORABLE TRACY CHRISTOPHER: They might
3 have, or, you know, maybe a question mark next to
4 something as they were going along.

5 MR. HAMILTON: Had they not been taking
6 notes you probably wouldn't have had as many questions,
7 right?

8 HONORABLE TRACY CHRISTOPHER: I think that's
9 true.

10 CHAIRMAN BABCOCK: R. H.

11 MR. WALLACE: One of the concerns I had and
12 I think we discussed at the last meeting was the
13 requirement of the Senate Bill 445 that the judge read the
14 question verbatim.

15 HONORABLE TRACY CHRISTOPHER: Uh-huh.

16 MR. WALLACE: Did you have a problem with
17 some of these and having to rephrase them, or were you
18 pretty much able -- just in looking at some of them, you
19 know, they're kind of long and convoluted.

20 HONORABLE TRACY CHRISTOPHER: They were kind
21 of long and convoluted. I didn't actually rephrase them.
22 I -- and sometimes they were asked third person instead of
23 how you would normally ask a question of a witness, and I
24 went ahead and left it that way. You know, some of them
25 were like, you know, "If so, X," and if they answered the

1 other way, you know, I left that part out, depending on
2 how the witness answered. So there was a slight variation
3 from how they exactly were written, but not much.

4 There was one question that we just
5 really -- I didn't understand. One of the lawyers said he
6 didn't understand. The witness said, "Oh, I know what
7 he's talking about there." I was like, well, okay, and we
8 went ahead; and it was Pete Huddleston, of course, who
9 understands what jurors are thinking; and actually, his
10 explanation was good and it was kind of an interesting --
11 which also was another thing we were talking about,
12 whether the witness should be there to hear the questions
13 ahead of time or not, and whether they should be excused
14 or not. Most of the witnesses, most of the key witnesses
15 were either parties or experts, that I think shouldn't
16 have been excluded. There was a couple that maybe it
17 would have been interesting if they hadn't heard the
18 question ahead of time, because, I mean, they clearly as
19 we went through the process -- the witness clearly was
20 like "What was that question again," you know, because
21 they were listening intently to it so that they would know
22 how to answer it. So that was kind of an interesting
23 dynamic, too.

24 CHAIRMAN BABCOCK: Judge, is there anything
25 about this experience that would cause you to look at

1 Senate Bill 445 and say there's a part of it that doesn't
2 fit or doesn't work?

3 HONORABLE TRACY CHRISTOPHER: Well, I
4 continue to believe that mandatory is a bad idea, and
5 asking questions verbatim, I think that's a bad idea, too.
6 I mean, I think you've got to have a little play in it. I
7 think as written the bill also still has that flaw about
8 at the end of the trial rather than after each witness.
9 Clearly needs to be after each witness, because, I mean,
10 you're not going to bring witnesses back that were on the
11 stand, you know, two weeks ago to answer a question.

12 MS. PETERSON: And one thing that I'll point
13 out about that is that in the amended version of Senate
14 Bill 445 the provision that specifically said "a witness
15 may be recalled to the stand to answer a juror question"
16 was removed. So that --

17 HONORABLE TRACY CHRISTOPHER: But it still
18 has that weird language.

19 MS. PETERSON: It still has it at the end.
20 Yeah.

21 HONORABLE TRACY CHRISTOPHER: You know,
22 "before deliberations" is what it says rather than "after
23 each witness." I mean, we could probably write a rule
24 that didn't do violence to the current language of 445,
25 but I think it ought to be clearer.

1 CHAIRMAN BABCOCK: You know, I think you can
2 also read this "before deliberations begin," I mean, if
3 you ask it after each witness, that is before --

4 HONORABLE TRACY CHRISTOPHER: Right.

5 CHAIRMAN BABCOCK: -- deliberations begin.

6 HONORABLE TRACY CHRISTOPHER: Right.

7 Exactly. Yeah.

8 CHAIRMAN BABCOCK: So it doesn't preclude
9 it, but it may be suggestive of a different procedure.
10 R. H.

11 MR. WALLACE: I guess the problem I would
12 see is how do you deal with the lawyer when you say, "Can
13 this witness be excused," and the lawyer says, "No, your
14 Honor, because rule such and such says that, and I want
15 him to stay."

16 HONORABLE TRACY CHRISTOPHER: Right. Right.
17 Yeah. I mean, I think if we have the opportunity, you
18 know, that we should get an amendment to the bill that
19 clearly says "after each witness."

20 MR. WALLACE: It doesn't seem to be a big
21 deal if it's not changed.

22 CHAIRMAN BABCOCK: Doesn't defeat the intent
23 of the legislation, I wouldn't think.

24 HONORABLE TRACY CHRISTOPHER: And, again, I
25 believe that generally the process should be reserved for

1 longer, more complicated cases.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE TRACY CHRISTOPHER: So I'm not
4 really in favor of the mandatory language of the bill.

5 CHAIRMAN BABCOCK: Yeah. Elaine.

6 HONORABLE TRACY CHRISTOPHER: And I don't
7 think most judges are either.

8 PROFESSOR CARLSON: Judge Christopher, did
9 you allow jurors to take their notes with them during the
10 deliberation?

11 HONORABLE TRACY CHRISTOPHER: I did.

12 PROFESSOR CARLSON: So you continue to be an
13 advocate of that procedure.

14 HONORABLE TRACY CHRISTOPHER: I do.

15 MS. PETERSON: One of the things I wanted to
16 point out, too, is that Senator Wentworth received the
17 results of the judge's survey that she sent around to all
18 the judges in the state.

19 HONORABLE TRACY CHRISTOPHER: All the trial
20 judges that try civil cases.

21 MS. PETERSON: So that's been sent over to
22 Senator Wentworth, and it's also gone to Hunt, who is the
23 chair of the committee on the House side. So they have
24 those, all the responses. I think there's a lot of good
25 qualitative data in there with the judges kind of opining

1 about the problems, how it might be beneficial, how it
2 might be detrimental.

3 HONORABLE TRACY CHRISTOPHER: Right. We had
4 a lot of comments on the asking questions, too.

5 MS. PETERSON: Uh-huh.

6 HONORABLE TRACY CHRISTOPHER: Good and bad.

7 CHAIRMAN BABCOCK: Bobby.

8 MR. MEADOWS: Judge Christopher, I, too, see
9 the practical advantage of having this process conducted
10 in connection with each witness' appearance, but I'm just
11 guessing that the reason that the rule -- I mean, the way
12 this statute is written or this proposal was written is in
13 terms of deliberations, because many times a question may
14 not occur until some other witness has testified. I mean,
15 it could be that they want to ask Pete Huddleston a
16 question because of something that happened later in the
17 trial after Huddleston was off the stand.

18 HONORABLE TRACY CHRISTOPHER: That's true.

19 MR. MEADOWS: And I'm just guessing that's
20 the intent of the original language, which is complicated,
21 -- complicates this idea of a more practical, more
22 efficient process of conducting this as the witness comes
23 and goes.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE TRACY CHRISTOPHER: I mean, I

1 think that is true. Obviously to the extent that people
2 recall witnesses because something comes up and they do it
3 in rebuttal or whatever, that happens as part of normal
4 trial practice.

5 MR. MEADOWS: But in effect this original
6 language would give the jury the authority to recall a
7 witness.

8 HONORABLE TRACY CHRISTOPHER: Right.
9 Although, like I said, I think there's some wiggle room in
10 the way it's written now.

11 CHAIRMAN BABCOCK: Yeah. Okay. Do you have
12 any -- anything to share with us or want our input on the
13 revised draft rule?

14 HONORABLE TRACY CHRISTOPHER: Yes. I think
15 in our committee we had some discussion about leaving in
16 the language about before voir dire in the rule because
17 there were at least one committee member, who is not here,
18 thought it wasn't a good idea for lawyers to ask about
19 juror questions in voir dire. You know, in terms of "The
20 judge is going to let you ask questions, you know, during
21 the trial. Are you the kind of person that you think you
22 would like that process or not like that process," and to
23 the extent that that may skew their jury selection or
24 might be used in some way to get a bias or prejudice
25 going, I think there was some concern about that.

1 So that is sort of the first substantive
2 issue, whether we want to continue to say "before voir
3 dire" or "at the latest before the presentation of
4 evidence."

5 CHAIRMAN BABCOCK: Justice Gray, then Buddy.

6 HONORABLE TOM GRAY: I personally like the
7 way you've got it written now, but I would add the word
8 "begin" after "evidence" -- or "begins," because the
9 argument could be made as presented that before a
10 particular subject of evidence or type of evidence starts,
11 and it would be clearer if you put "before the
12 presentation of evidence begins" or "before the
13 presentation of all evidence," something to indicate that
14 it's got to be before in effect the first witness lands in
15 the chair. Otherwise, you may get, "Well, Judge, we're
16 just now getting to this witness, hadn't presented any
17 evidence to this witness, and the jury may want to ask
18 questions of this witness."

19 HONORABLE TRACY CHRISTOPHER: Oh, oh, and I
20 have to tell you I made a mistake, so please, appellate
21 judges, close your ears, but --

22 HONORABLE TOM GRAY: It was a mistake, not
23 an error.

24 MS. PETERSON: Right.

25 CHAIRMAN BABCOCK: Harmless.

1 HONORABLE TRACY CHRISTOPHER: We agreed to
2 the process. Well, actually the lawyers and Judge Miller
3 had agreed to the juror question process. The first
4 witness was on the witness stand for over the course of
5 five days, and I totally forgot to ask the jury before I
6 sent him on his way, and because, you know, I wasn't used
7 to the process I totally forgot, and then so we're like
8 "What do we do now?" And so one side was like, "Well, I
9 think we better just scrap the whole process," and the
10 other side is like "Let's recall the witness." I'm not
11 recalling that witness that's been on the stand for five
12 days, I'm just not, I'm sorry. Okay. I can't imagine
13 that there's a question that hadn't been asked of that
14 witness after five days, and he wasn't a very good witness
15 either.

16 So, I mean, both sides agreed with me he was
17 not a very good witness. He was independent of either
18 side, and so, you know, it was one of these things where
19 he wrote a bunch of documents but he hadn't looked at them
20 in three years, and it was just painstaking over each one
21 with him as he "Well, yeah, that's what that says, but,
22 you know, not really sure," you know, "I'll just have to
23 stick with what it says." We could have just read these,
24 you know, 30 documents in about two hours, but anyway, so
25 we went ahead, but there was some question about, you

1 know, we forgot on that witness, what do we do now. So --

2 CHAIRMAN BABCOCK: Buddy, then Richard
3 Munzinger.

4 MR. LOW: Has there been any discussion
5 about increasing the cost of litigation? We're always
6 faced with the question of trying to reduce the cost
7 because people are avoiding litigation, and it would
8 appear to me that if you can recall a witness and bring
9 the expense of that and do all of that, that would further
10 add to the expense of litigation. Has that been discussed
11 in some of the meetings or before the Legislature or --

12 HONORABLE TRACY CHRISTOPHER: No, I don't
13 think so, in terms of that original idea that, you know,
14 witnesses might be subject to recall again to answer the
15 questions.

16 MR. LOW: Yeah.

17 HONORABLE TRACY CHRISTOPHER: But I think
18 it's a good point.

19 MR. LOW: Okay.

20 HONORABLE TRACY CHRISTOPHER: I mean, I
21 wouldn't be in favor of something that would allow the
22 jurors to --

23 MR. LOW: Yeah.

24 HONORABLE TRACY CHRISTOPHER: -- have the
25 ability to recall witnesses. I mean, especially expert

1 witnesses that, you know, might testify and, you know,
2 they're charging a thousand dollars an hour and suddenly
3 they've got to come back. I mean, that would be a big
4 expense.

5 MR. LOW: Yeah.

6 CHAIRMAN BABCOCK: Richard, then Carl.

7 MR. MUNZINGER: Were any questions directed
8 to the Court?

9 HONORABLE TRACY CHRISTOPHER: No. There was
10 one comment directed to the lawyer, which I'm not sharing
11 with you, and there was one comment about the presentation
12 of evidence on the screen.

13 MR. MUNZINGER: The Senate bill says "submit
14 to the court written questions directed to a witness or to
15 the court as provided by this section," and our discussion
16 has focused on questions to a witness. I was just curious
17 if the bill passes as written what your thoughts would be
18 about questions directed to the court.

19 HONORABLE TRACY CHRISTOPHER: Well, it's
20 kind of interesting because I think in a lot of -- a lot
21 of times lawyers don't do a very good job at the beginning
22 of their case about talking about what is going to be
23 asked of them at the end of the case. So, for example,
24 one of the jurors asked "What is tortious interference?"
25 Okay, well, we've got a pretty good definition of it in

1 PJC. You know, it's -- I'm pretty sure I'm going to give
2 that definition, and I think lawyers who -- especially
3 with a concept like that, if they start out with it and
4 talk about it in opening, maybe even have a little
5 blow-up, you know, "we expect" -- use that language, "we
6 expect that" -- "the judge, of course, is going to decide
7 the law, but we expect it's going to look something like
8 this," so that that definition then when they see it in
9 the jury charge it doesn't come as a big shock to the
10 jurors, is actually a pretty good idea, and it is actually
11 something that has been discussed nationwide, the concept
12 that the judges should kind of tell -- give the jury a
13 road map on what the factual issues that they're going to
14 have to answer at the end of the day and kind of assist
15 them with the law at the beginning, but I don't remember
16 where that went.

17 I don't think we ever discussed it very much
18 here in the Supreme Court Advisory Committee, but that
19 concept is out there, that the court should spend a little
20 more time at the beginning sort of telling the jury, you
21 know, "These are the issues in the case," but, you know,
22 in a case that is fairly simple where I'm pretty sure I'm
23 going to use this definition, that's doable. In a case
24 that's pretty complicated where you're not really sure
25 what the questions are going to be until the end of the

1 evidence, that's a lot more difficult.

2 This jury charge deviates from the pattern
3 jury charge and asks a lot of very specific factual
4 questions that we fought long and hard over before it
5 ended up getting submitted to the jury, so I would not
6 have been in the position to inform the jury, you know,
7 what the key issues were going to be in the case at the
8 beginning of the case. So, you know, I'm kind of both
9 sides on that issue. To the extent that the judge can
10 help out, I think it's a good idea, and I certainly do
11 that in voir dire when the jurors like get stuck on
12 something like, you know, amount of damages for something,
13 and I said, "Look," you know, "This is what you're going
14 to be asked: What amount of amount of money if paid now
15 in cash would fairly and reasonably compensate the
16 plaintiff for X, and that's your job to decide based on
17 the evidence you hear," because I know that question is
18 going to be asked. But when you have a more complicated
19 case it makes it harder to do.

20 CHAIRMAN BABCOCK: Carl, and then Ralph.

21 MR. HAMILTON: Do you see any benefit in
22 limiting the number of questions a juror could ask?

23 HONORABLE TRACY CHRISTOPHER: No, I really
24 don't. I didn't think even the one that asked like 12
25 questions of one particular witness, I didn't see a

1 problem with it.

2 CHAIRMAN BABCOCK: Ralph.

3 MR. DUGGINS: I think Richard pointed out
4 something significant with this proposed bill. If you're
5 required to allow questions to the court, as this is
6 written, it requires you to read those questions out loud
7 and presumably you've got to answer them, because it says,
8 "Juror questions will be answered orally in open court."

9 HONORABLE TRACY CHRISTOPHER: Well, judges
10 are pretty much a master at not answering questions. If
11 we're in a -- in that position -- you know, just like we
12 get them all the time while the jury is deliberating.
13 They'll ask really good questions that you're not allowed
14 to answer, and you just sort of don't answer it and send
15 it back with kind of an answer, you know, "Please continue
16 deliberating," or, you know, "Don't worry about that,
17 please refer to these five instructions that have nothing
18 to do with what your question," you know, and send it back
19 to them, so I mean, we could do it.

20 MR. DUGGINS: It seems to me, though, this
21 could be -- you could carve out questions of the court
22 from that mandatory process and should, in my view.

23 CHAIRMAN BABCOCK: Richard, and then --

24 MR. MUNZINGER: Not to belabor a point, but
25 Senate bill, section (b) (1), "Jury questions must be

1 submitted anonymously." In your case because of its
2 complexity and the length of time the witnesses were on
3 the witness stand you had them go to the jury room. I can
4 watch one of 12 jurors write out his question or her
5 question and pass it down the list and be given to the
6 bailiff and anonymity is lost.

7 HONORABLE TRACY CHRISTOPHER: I don't think
8 you'd be doing that.

9 MR. MUNZINGER: Well, but my --

10 HONORABLE TRACY CHRISTOPHER: Because I
11 think that would be a mistake on your part as a lawyer if
12 you did, because I think the jurors would feel violated.

13 MR. MUNZINGER: Well, if I make my objection
14 silently to the court out of the presence of the jury,
15 I've lost nothing with the jury.

16 HONORABLE TRACY CHRISTOPHER: No, I mean
17 watching --

18 MR. MUNZINGER: No, I understand.

19 HONORABLE TRACY CHRISTOPHER: -- who's
20 writing the question out. I don't think you'd do that.

21 MR. MUNZINGER: Well, if you try a lawsuit
22 you don't close your eyes when the judge turns to the jury
23 and says, "Anybody have a question?" and Juror Smith
24 writes out his question. You would be a dang fool if you
25 didn't watch him write out his question, and you would be

1 a bigger fool if you didn't listen to its content.

2 HONORABLE TRACY CHRISTOPHER: I'm just
3 saying.

4 MR. MUNZINGER: You would be a dead man if
5 you didn't draw a conclusion from the process, and my only
6 point is --

7 HONORABLE TRACY CHRISTOPHER: I know Judge
8 Miller in a previous trial, the way he did it, he passed a
9 form out to every juror, and they sat there and pretended
10 to write something, you know, and then passed it back, and
11 sometimes it was 12 blank forms, but he explained to them
12 that, you know, we're trying to keep it anonymous.

13 MR. MUNZINGER: My only point is if the
14 Legislature adopts this bill in this form and the Governor
15 signs it, it is a requirement of law that the question be
16 submitted anonymously, and it raises a problem of how you
17 police anonymity in the circumstance of the case different
18 from the one that you tried. That's the only point that
19 I'm raising.

20 CHAIRMAN BABCOCK: Got it. Roger.

21 MR. HUGHES: Yeah, I was really troubled by
22 allowing jurors to address questions to the judge which
23 have to be answered by the judge. Maybe jurors in some
24 cities only want to know things like definitions and
25 terms, but, you know, I try cases in smaller counties, and

1 I can see jurors asking question like "We're really tired
2 of the questions being asked by lawyer so-and-so, they're
3 longwinded and tedious. When are you going to shut him
4 up?" And -- or "The lawyers are spending too much time
5 arguing, will you tell them to quit?"

6 I can see what is going to happen is that
7 the bill was designed to allow the jurors to obtain
8 information from the witnesses, but by allowing that
9 phrase to be in there and then requiring the judge to
10 answer it, you've almost created a system of 13 judges
11 instead of just one, and especially in a system where
12 judges know they're going to have to be elected, there may
13 be a certain amount of pressure by the -- so to speak, to
14 rise to such questions, where the jurors have become
15 dissatisfied not with a lack of information or a
16 misunderstanding about the questions they're going to have
17 to answer.

18 They just -- they want to, so to speak,
19 hijack the process and take over the judge's role of
20 directing the flow of evidence, et cetera, et cetera. I
21 am really worried about that phrase being used and
22 interpreted in that manner.

23 CHAIRMAN BABCOCK: Roger, if the bill
24 section (b) (6) was amended to say, "The court may for good
25 cause prohibit or limit the submission of questions to

1 witnesses or the court" to make it parallel to the
2 introductory section to 25.002, would that solve the
3 problem?

4 MR. HUGHES: Well, as long as it gives the
5 judge -- well, it's still the same. The comment was made
6 earlier, a lawyer who doesn't listen to the fact that a
7 juror is asking a question like that is in big trouble. I
8 think you're putting the same pressure on the judge.

9 CHAIRMAN BABCOCK: Well, as Judge
10 Christopher says, judges are adept at sidestepping direct
11 questions. Some judges.

12 HONORABLE TRACY CHRISTOPHER: Some.
13 Sometimes.

14 CHAIRMAN BABCOCK: Judge Peeples.

15 HONORABLE TRACY CHRISTOPHER: I would prefer
16 not to have that in there, but --

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE TRACY CHRISTOPHER: I would prefer
19 not to have the bill at all, because we're all rocking
20 along just fine without it.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. HUGHES: Again, you know, they are adept
23 at sidestepping the questions, but this is a state where
24 they all have to run for election, and you know, you
25 sidestep the question during election season, it may end

1 up on the front page of the paper.

2 CHAIRMAN BABCOCK: Judge Peeples.

3 HONORABLE DAVID PEEPLES: I think that we
4 can send 265.1 to the Supreme Court.

5 CHAIRMAN BABCOCK: Right.

6 MS. PETERSON: The Legislature won't pass
7 that bill, and we won't have to worry about it, and
8 therefore, we should spend our time trying to perfect
9 265.1 instead of complaining about Wentworth's bill.

10 CHAIRMAN BABCOCK: Okay. Did you get that,
11 the raspy comment by Judge Peeples? Harvey.

12 HONORABLE HARVEY BROWN: What did you do
13 about the comments? You said there wasn't a question.
14 Did you read it to the lawyers? You said there was a
15 comment about the lawyers or one lawyer. You read it? I
16 take it it was derogatory.

17 HONORABLE TRACY CHRISTOPHER: Yes, it was,
18 and I read it.

19 MR. MEADOWS: With glee.

20 HONORABLE TRACY CHRISTOPHER: No. No. I
21 actually told the lawyer I didn't agree with the comment,
22 so --

23 CHAIRMAN BABCOCK: Okay. Yeah, Buddy.

24 MR. LOW: As a practical matter did you get
25 any argumentative questions like I've heard lawyers will

1 ask, "How do you expect the jury to believe you when
2 you've already lied about such and such?" I mean, were
3 there --

4 HONORABLE TRACY CHRISTOPHER: Kind of.
5 Yeah. Some of them were that way.

6 MR. LOW: Yeah, so you have, of course, the
7 discretion.

8 MR. MUNZINGER: Did you ask them?

9 HONORABLE TRACY CHRISTOPHER: Yeah, because
10 nobody objected to it. I said "okay."

11 CHAIRMAN BABCOCK: All right. Following up
12 on Judge Peeples' suggestion, I think it is a good idea to
13 go back to see if there are any other glitches in the
14 draft Rule 265.1 that we've been talking about, and we've
15 had one comment from Justice Gray about how it ought to be
16 made clear in (b) (1) that it should be before voir dire or
17 at the latest before the presentation of evidence begins.

18 HONORABLE TOM GRAY: I think "any evidence"
19 works.

20 CHAIRMAN BABCOCK: "Any evidence."

21 HONORABLE TOM GRAY: "Before the
22 presentation of any evidence" --

23 CHAIRMAN BABCOCK: "Any evidence," okay.

24 HONORABLE TOM GRAY: -- works better than
25 what I initially said.

1 CHAIRMAN BABCOCK: Any other comments about
2 the draft 265.1 as amended from our last meeting? Yeah,
3 Justice Gray.

4 HONORABLE TOM GRAY: On page two in the
5 italicized section right above subscript (b), third line
6 up, first you've added the word "from another person"
7 right above that, and then you entered -- have the
8 sentence, "That is because of my overall instruction that
9 you must not discuss the case among yourselves."

10 Obviously it's broader than just among
11 yourselves. "You're not supposed to discuss the case with
12 anyone" or something of that nature, and it seems to
13 unduly restrict the persons discussing the question with
14 at that point. It wasn't quite parallel was the only
15 thing I noticed.

16 HONORABLE TRACY CHRISTOPHER: Okay.

17 CHAIRMAN BABCOCK: Gotcha. Any other
18 comments? Harvey.

19 HONORABLE HARVEY BROWN: Maybe I missed it,
20 but I think it would be a good idea to have something that
21 the trial court should attempt to have anonymity for the
22 questions. Maybe it's in here.

23 MS. PETERSON: They do --

24 HONORABLE TRACY CHRISTOPHER: Okay. We have
25 done it in a footnote. Let's see.

1 MS. PETERSON: And also in the rule to the
2 extent that the jurors are instructed not to put their
3 names on the form. It's a measure to protect anonymity,
4 even though it doesn't secure protection.

5 HONORABLE HARVEY BROWN: Right, they may put
6 their number or --

7 MS. PETERSON: Right.

8 HONORABLE TRACY CHRISTOPHER: Let's see, did
9 we lose the actual footnote?

10 MR. MEADOWS: Page three.

11 MR. SCHENKKAN: Page three, No. 10.

12 MR. MEADOWS: That's a discussion of the
13 issue.

14 HONORABLE TRACY CHRISTOPHER: I know, but I
15 thought we actually -- I thought I had an actual footnote
16 drafted.

17 MS. PETERSON: On page four it says "comment
18 to 2009 changes." Is that what you're referring to?

19 HONORABLE TRACY CHRISTOPHER: Oh, yeah,
20 there it is, there it is. Sorry. There it is. Comments.

21 PROFESSOR ALBRIGHT: Oh, the comment.

22 CHAIRMAN BABCOCK: Yeah, good.

23 HONORABLE TRACY CHRISTOPHER: And this is
24 where we tell them they might want to take a break after
25 each witness to allow the jurors to write questions in the

1 privacy of the jury room.

2 HONORABLE HARVEY BROWN: Why do you think it
3 should be a comment rather than part of the rule, the
4 attempt to keep anonymity?

5 HONORABLE TRACY CHRISTOPHER: Because, like
6 I said, if the witness was on the witness stand for an
7 hour and it's, you know, going to be like no questions or
8 it's going to be, you know, one quick question, just the
9 whole idea that I'm going to have to take a break, let
10 everybody file out, everybody file back in after every
11 witness just struck me as unnecessary. If the group
12 thinks that, you know, anonymity has to be maintained to
13 the highest extent possible, the best way to do that is to
14 take a break, send them to the jury room to ask the
15 questions.

16 CHAIRMAN BABCOCK: Richard Munzinger.

17 HONORABLE TRACY CHRISTOPHER: And it's just
18 sort of a -- I would prefer to have it as a comment rather
19 than a mandatory procedure.

20 CHAIRMAN BABCOCK: Richard.

21 MR. MUNZINGER: Well, anonymity if used by
22 the Legislature and signed by the government means
23 anonymity. It's not -- like pregnant, I'm just a little
24 pregnant. You're either anonymous or you aren't, and if
25 the law says that juror question must be asked

1 anonymously, we have an obligation if we were drafting a
2 rule for the Supreme Court to honor the intent of the
3 Legislature and make sure that it's anonymous, and I
4 recognize the -- I'm a trial lawyer. I know what time
5 means, and I know what it means to take people in and out
6 of the jury room and how everybody is upset about it and
7 what have you, but if they use the word, by golly, I think
8 the rule has to respect that word, and you're joking if
9 you say that, "Well, here, let me write this down," and I
10 don't know who wrote it.

11 HONORABLE TRACY CHRISTOPHER: Well, I agree
12 with you. I think this version is what our preferred
13 version is as opposed to the version that follows the law
14 as it is currently drafted and that if the law that was
15 currently drafted became the law, we would have to change
16 this rule. But I kind of agree with Judge Peoples that
17 maybe if we have a completed rule that everybody is happy
18 with, we can sort of go around the bill as written and
19 suggest this as an alternative, but I agree with you. It
20 would have to be changed.

21 MR. MEADOWS: But anonymity from whom? It's
22 the parties. You're certainly not going to accomplish it,
23 even under these suggested ways from keeping one juror
24 writing a note and the juror sitting right next to that
25 person seeing it. The note writer is not anonymous in

1 that situation, so, I mean, I think we have to give some
2 interpretation of what the bill calls for.

3 MR. MUNZINGER: Well, I think --

4 CHAIRMAN BABCOCK: I think 12 hermetically
5 sealed booths.

6 MR. MEADOWS: Yeah.

7 MR. MUNZINGER: Yeah, but here's the
8 problem. The basic tenor of statutory construction is
9 that no word is used without intent. You've got to honor
10 the words chosen by the Legislature, just like you do in a
11 contract.

12 MR. MEADOWS: Well, what do you think it
13 means?

14 MR. MUNZINGER: Let me finish. So obviously
15 we understand that if you send 12 people into a room, that
16 11 are going to watch me write my question. It's obvious
17 that the question of anonymity or the issue of anonymity
18 is designed to protect anonymity of the jurors from the
19 parties and arguably from the court. You can't ignore the
20 word "anonymous" or "anonymity" in the statute to
21 accomplish convenience for the trial if you're going to
22 have a rule like this.

23 MR. MEADOWS: Well, you've just applied --

24 MR. MUNZINGER: That's part of the problem
25 of having a rule like this, if you're going to use the

1 word "anonymous."

2 MR. MEADOWS: But, Richard, you just applied
3 an interpretation to the word.

4 MR. MUNZINGER: Sir?

5 MR. MEADOWS: You have just applied your
6 interpretation to it. You have decided that anonymity in
7 this context means not anonymity in the jury room.

8 MR. MUNZINGER: Well, but at some point in
9 time the Supreme Court of Texas may have to decide that
10 question in a lawsuit before the Court if you don't adopt
11 a rule that decides the question before it gets there,
12 because the first time I try this case or I try a case
13 under this rule, I'm going to make the point, "Just a
14 minute, that juror wrote that question out and I know who
15 it was, you didn't maintain anonymity." So the Court is
16 going to have to face that issue at some point in time, as
17 is a trial judge going to have to face that issue at some
18 point in time.

19 You can be as cute as you wish about
20 determining what anonymity means in which context. The
21 obvious intent is that the anonymity of the question and
22 juror should be protected from the parties and their
23 counsel. That's clear. Otherwise you wouldn't have it.
24 So write the rule. If they pass it this way. My only
25 point is you can't ignore a word used by the Legislature

1 and be loyal to the law.

2 CHAIRMAN BABCOCK: Alistair.

3 MR. DAWSON: Years ago we tried a case or I
4 tried a case where we had juror questions, and in that
5 case we allowed the individual jurors to decide whether
6 they wanted to keep their anonymity or not. They could
7 take the question and put it on the edge of the jury box,
8 in which case the bailiff would come get it and take it up
9 to the judge, and the judge would call the lawyers up, and
10 if it was an appropriate question or there were no
11 objections we would read the question and then the witness
12 would answer. That's a whole lot more efficient than
13 piling out and piling back in the jury box. If the juror
14 didn't want to put it on the edge, they could pass it
15 down, and it would make its way to the bailiff, so it was
16 left to the individual juror as to whether or not -- how
17 they handled the issue of note-taking, whether they just
18 put it up there or passed it down, and I would recommend
19 some kind of system like that to let them decide how they
20 want to handle it.

21 CHAIRMAN BABCOCK: Yes, Justice Gray.

22 HONORABLE TOM GRAY: On page four, item (7),
23 to me it seems like we are going to have to include in the
24 record a copy of the form. I don't think that's what you
25 intend. I would suggest the change to "The trial court

1 must include every juror question in the record," leave
2 out the word "form," or you could make it read, "The trial
3 court must include every completed juror question form in
4 the record," so that you're not just including the blank
5 forms themselves.

6 HONORABLE TRACY CHRISTOPHER: I think we
7 were trying to say that by saying "any submitted," but
8 "every completed" is clearer.

9 PROFESSOR ALBRIGHT: "Any submitted," what
10 if you find some in the jury room?

11 CHAIRMAN BABCOCK: In the case you just
12 tried, Judge, did you put it in the clerk's record or the
13 reporter's record?

14 HONORABLE TRACY CHRISTOPHER: Clerk record.

15 CHAIRMAN BABCOCK: Sounds sensible to me.
16 Buddy.

17 MR. LOW: Yeah, is there anything -- I know
18 footnote two says that there must be live witnesses as
19 distinguished from -- is there anything in here -- and
20 maybe I've overlooked it -- that says that you must ask
21 while the person is -- after they finish their testimony
22 rather than recalling?

23 HONORABLE TRACY CHRISTOPHER: Yes. We have
24 it in the instruction there.

25 MR. LOW: Okay.

1 HONORABLE TRACY CHRISTOPHER: "And before
2 each witness is excused."

3 MR. LOW: Okay. All right. Okay.

4 HONORABLE TRACY CHRISTOPHER: And we've also
5 in (a) showed that it's limited to witnesses who have
6 appeared and testified, as in the live ones.

7 MR. LOW: Well, but the first witness, live
8 witness, has appeared and he testified and then 10 more
9 testified.

10 HONORABLE TRACY CHRISTOPHER: Right. We
11 decided to keep "live" out since it was slang.

12 CHAIRMAN BABCOCK: Kennon.

13 HONORABLE TRACY CHRISTOPHER: Because other
14 people might not know why we were talking about live
15 witnesses.

16 CHAIRMAN BABCOCK: As opposed to the dead
17 ones.

18 MS. PETERSON: Yeah. Two comments. We
19 added the sentence on page one to subdivision (b)(2)(a),
20 "The trial court may modify these instructions as the
21 circumstances of the particular case may require," which is
22 modeled after the language in the order following Rule
23 226a. It occurred to me that we have that ability to
24 modify for the instructions but not for the form, and to
25 the extent there's overlap between the content of the

1 instructions and what's in the form, I wonder whether we
2 should specify the extent to which a judge can modify or
3 add the same leeway in modification to the form.

4 And there's not a great deal of overlap, but
5 one of the areas of overlap is the scope of the question.

6 HONORABLE TRACY CHRISTOPHER: Well, I think
7 it might be useful to say "and the form," actually,
8 because, you know, a couple of the courts on the juror
9 question form, they actually will put a little notation
10 down at the bottom, "accepted," "rejected," and you know,
11 sign it for the people that are already doing it. So I
12 would think it might be a good idea if people thought that
13 that was a useful way to do it. That would make it a
14 little more difficult if you had jurors like mine that,
15 you know, asked three or four questions all on one form,
16 and I ended up just on some of these if there were no
17 objections I just put "okay," so I would remember and then
18 anything that was sustained I put "sustained" next to it
19 so I would know not to ask it as I was going back when
20 they came back into the record, so that -- it might be
21 useful as the process evolves to allow the judge to modify
22 the form slightly, too.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE TRACY CHRISTOPHER: And like this
25 little cover sheet that I came up with, you know, I think

1 it's a useful thing to have, but I don't think people have
2 to have it, but I thought, well, this keeps it all
3 together for appellate purposes, and so we'll all know
4 what they -- what it referred to and --

5 CHAIRMAN BABCOCK: Yeah, great. Yeah.

6 MS. PETERSON: One other thing. On page
7 four, paragraph (4), we have language in there now, "Upon
8 receipt of a written question from the jury the trial
9 court must allow the parties to read the question," and I
10 think the idea was at one point along the drafting in the
11 drafting process not to have the verbatim question on the
12 record if it's a really bad question, if the judge is
13 going to decide not to ask it, and so I don't know if we
14 want to modify that mandatory language to reflect that
15 maybe the judge is going to read it out loud or give the
16 judge the ability to read it one way or another.

17 PROFESSOR ALBRIGHT: Isn't that just talking
18 about allowed to read the question to make objections to
19 the form?

20 MS. PETERSON: But I think, Judge
21 Christopher, if I understood correctly, you actually read
22 the questions out loud; is that right?

23 HONORABLE TRACY CHRISTOPHER: I did.

24 CHAIRMAN BABCOCK: But I thought this is
25 more in the sense of review the question then as opposed

1 to reading it out loud or on the record.

2 HONORABLE TRACY CHRISTOPHER: From -- well,
3 no, actually No. (4), the way we have it written says
4 "must allow the parties to read the question."

5 MS. PETERSON: Uh-huh.

6 HONORABLE TRACY CHRISTOPHER: And I actually
7 just read them out loud because I had four sets of
8 lawyers, and so, you know, having them all sort of huddled
9 over the one piece of paper I thought was, you know, a
10 little more difficult, so I just read each question.

11 PROFESSOR ALBRIGHT: Was the jury there?

12 HONORABLE TRACY CHRISTOPHER: No. I just
13 read each question and called for an objection and then
14 ruled after each one, like I said, rather than actually
15 showing them the form. There was one I couldn't read the
16 handwriting they helped me with in terms of actually
17 reading it, but -- so --

18 MS. PETERSON: Can we say like, "The trial
19 court must either read the question or allow the parties
20 to read the question"? Should we just modify that a
21 little bit?

22 HONORABLE TRACY CHRISTOPHER: Yeah. That
23 probably is a good idea.

24 CHAIRMAN BABCOCK: Professor Dorsaneo.

25 HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry,

1 and we added that instead of the appellate concerns last
2 time about, you know, the trial judge must rule on the
3 objections, we went back to "and to obtain a ruling,"
4 which is the language that's in the evidentiary rules,
5 kind of puts the burden back on the lawyers to make sure
6 they get a ruling on the objection, similar way that the
7 evidence rules are written.

8 CHAIRMAN BABCOCK: Bill.

9 PROFESSOR DORSANEO: Judge Christopher, are
10 you going to put that modify the form language in
11 (b) (2) (b), right?

12 HONORABLE TRACY CHRISTOPHER: Yes.

13 PROFESSOR DORSANEO: Okay.

14 CHAIRMAN BABCOCK: Richard.

15 MR. MUNZINGER: Paragraph (4) on page four
16 as presently drafted appears to be inconsistent with
17 Senate Bill 445 as it is currently written in the first
18 sentence because it says that the objections to the
19 question on the record obtain a ruling outside the jury's
20 hearing, but SB 4455 says in (b) (2), "Counsel for each
21 party will be given an opportunity out of the presence of
22 the jury and witnesses to object to the questions."

23 CHAIRMAN BABCOCK: Yeah, we're not trying to
24 harmonize this draft rule with 445.

25 MR. MUNZINGER: Okay.

1 CHAIRMAN BABCOCK: If that passes we're
2 going to have to come back to the drawing board.

3 MR. MUNZINGER: Okay.

4 MR. MEADOWS: I have one question. Did you
5 say, Judge Christopher, whether or not you allow the
6 lawyers to re-examine the witness after the question was
7 put to the witness?

8 HONORABLE TRACY CHRISTOPHER: I did, and
9 they chose not to.

10 CHAIRMAN BABCOCK: Okay. Buddy.

11 MR. LOW: Tracy, don't you think some of
12 this has got to be up to the discretion of the judge and
13 what kind of case and like you did, and you can't just tie
14 their hands on everything, I don't think.

15 HONORABLE TRACY CHRISTOPHER: No, I agree.
16 So, as I said, I like -- if such a rule passed I would
17 much prefer it to be discretionary --

18 MR. LOW: Right.

19 HONORABLE TRACY CHRISTOPHER: -- and to give
20 the judge and the parties a little more discretion on how
21 it should play out.

22 MR. LOW: Yeah.

23 CHAIRMAN BABCOCK: Okay. Any other comments
24 about the revisions? They can be anonymous. Judge.

25 HONORABLE TOM LAWRENCE: Are we going to

1 vote this out today?

2 CHAIRMAN BABCOCK: Well, not really.
3 Because we're going to have to see what the Legislature
4 does, because as Richard just pointed out a couple of
5 times, if that bill passes, then there are parts of this
6 that are inconsistent, so we're going to have to make some
7 decisions about that.

8 MR. LOW: But, Chip, I thought if the Court
9 could --

10 HONORABLE TOM LAWRENCE: If I could finish
11 my -- if this is going to apply to JP courts, and I
12 believe it is --

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE TOM LAWRENCE: Because it's going
15 to apply to all trial courts, so we're going to need to
16 have, as I mentioned last time, a separate rule in the 500
17 series, the justice court rules, for this; and the other
18 question that comes up is what are we going to do about
19 small claims court, if anything, since the Supreme Court
20 has not typically promulgated any rules for small claims
21 court, but I don't know how the small claims court judges
22 are going to pick this up unless the Supreme Court does
23 something.

24 MS. PETERSON: Well, I guess if Duncan's
25 bill becomes law, the Court will be writing rules for

1 small claims.

2 HONORABLE TOM LAWRENCE: Well, I know. If
3 it does I think it will solve the problem, but if it
4 doesn't --

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TOM LAWRENCE: But I would like to
7 have the opportunity before this thing becomes final to
8 take this with a couple of small changes and have a
9 similar rule for the JP section.

10 CHAIRMAN BABCOCK: Okay. Yeah. And let me
11 amend what I just said, Judge. I think that the thought
12 is to try to get a rule, a draft rule, that this committee
13 is comfortable with and then the Court, if the Court is
14 comfortable with it, we'll undoubtedly let Senator
15 Wentworth and Chairman Hunter know what our thinking is
16 about it.

17 HONORABLE TOM LAWRENCE: Well, if I could,
18 maybe I could just kind of write something up as a --
19 something for the JP section and send that to you, if I
20 could next week.

21 CHAIRMAN BABCOCK: Sure. That would be
22 great.

23 HONORABLE TOM LAWRENCE: I won't take time
24 today.

25 CHAIRMAN BABCOCK: Yeah, Alistair.

1 MR. DAWSON: Yeah, I guess following on what
2 you just said, I mean, the consensus I hear is that the
3 rule that we've drafted is significantly better than what
4 the Legislature has attempted to do. Following up on
5 Judge Peebles' point, wouldn't it make sense for us to
6 vote it out today so that we can then go and send it to
7 the Court and so that the Court could then go to Wentworth
8 and say, "You don't need to deal with this. We've already
9 got a rule that we're going to enact."

10 CHAIRMAN BABCOCK: I think that's in effect
11 what we're doing.

12 MR. DAWSON: Okay. I thought I heard you
13 differently.

14 CHAIRMAN BABCOCK: Yeah, that's why I
15 amended my -- what I was trying to say was we certainly
16 aren't -- this committee, and I know the Court isn't
17 either -- trying to stamp on the Legislature if they want
18 to pass a law that they think is the law that ought to be,
19 but at the same time, we've studied this, we have a rule
20 now that we think works. If the Court agrees with this
21 committee, then that information will be submitted to the
22 Legislature I'm sure. Yeah, Ralph.

23 MR. DUGGINS: Well, I was going to echo what
24 Alistair said. I hope we will take some vote today after
25 all the hard work has been done and send it to the Court

1 so that somebody at the Court can consider whether to
2 present this to Wentworth's office.

3 CHAIRMAN BABCOCK: Yeah, and we can take
4 another vote if we want to, but I think the last meeting
5 we voted overwhelmingly --

6 MR. DUGGINS: I agree.

7 CHAIRMAN BABCOCK: -- with like maybe one
8 dissent or two dissents for this rule, with a few tweaks,
9 which we've now talked about today. So --

10 MS. PETERSON: And for what it's worth
11 again, I did direct Wentworth's staff to Jackson Walker's
12 website that has all the drafts so that they could see the
13 progress of the committee.

14 CHAIRMAN BABCOCK: Uh-huh. Good. Good.
15 Okay. Yeah, Justice Jennings.

16 HONORABLE TERRY JENNINGS: I'm still just a
17 little bit concerned about the tightness of the first
18 paragraph, the discretion of the trial court.

19 CHAIRMAN BABCOCK: Okay.

20 HONORABLE TERRY JENNINGS: The whole point
21 is upon the completion of the witness' testimony, right?
22 So after the parties have asked all the questions. I
23 would recommend a phrase beginning something along the
24 lines of "Upon the completion of the testimony of a
25 witness who has appeared in person and testified in the

1 trial," comma, "on its own initiative or a party's request
2 the trial court in its discretion may allow the jurors to
3 submit questions to the witness."

4 CHAIRMAN BABCOCK: And what does that fix?
5 What problem does that fix, Judge?

6 HONORABLE TERRY JENNINGS: Well, my concern
7 was Judge Christopher said she wanted to put in "live
8 testimony," but didn't put it in because it sounds awkward
9 about "live."

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE TERRY JENNINGS: So just say, "a
12 witness who has appeared in person to testify." And it
13 makes it clear that the questions will be submitted only
14 after they have testified, upon their complete testimony.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE TERRY JENNINGS: That's the only
17 recommendation I would have.

18 HONORABLE TRACY CHRISTOPHER: Okay.

19 CHAIRMAN BABCOCK: Good. Great. Anything
20 else?

21 MR. HARDIN: Could you say one more time how
22 that would read then?

23 HONORABLE TERRY JENNINGS: "Upon the
24 completion of the testimony of a witness who has appeared
25 in person and testified in the trial," comma, et cetera,

1 "on its own initiative or on a party's request, the trial
2 court in its discretion may allow jurors to submit written
3 questions to the witness."

4 CHAIRMAN BABCOCK: Okay. Bill.

5 PROFESSOR DORSANEO: Does anybody else think
6 that some attempt ought to be made to say what anonymity
7 is? I don't think it has any clear meaning either. I
8 think everybody will wonder how anonymous you need to be.

9 CHAIRMAN BABCOCK: Are you talking about the
10 comment?

11 HONORABLE TRACY CHRISTOPHER: Comment?

12 PROFESSOR DORSANEO: Yes.

13 HONORABLE TRACY CHRISTOPHER: Well, I don't
14 know that -- I don't know how I can improve it. I'll just
15 tell you that.

16 PROFESSOR DORSANEO: Okay.

17 CHAIRMAN BABCOCK: Justice Gaultney.

18 HONORABLE TERRY JENNINGS: It's an awkward
19 situation, because you're trying to protect the anonymity,
20 but it's virtually impossible.

21 HONORABLE DAVID GAULTNEY: This is on a
22 different issue, but under (a), the way I read the
23 structure of the rule as has been proposed, the trial
24 court has discretion to allow questions in the trial by
25 jurors, not questions as to any particular witness. In

1 other words, once you start down the road of allowing
2 juror questions then the rule has a mandatory, you must do
3 this, you must do that, and that's the way I'm reading the
4 rule, right?

5 HONORABLE TRACY CHRISTOPHER: Right.

6 HONORABLE DAVID GAULTNEY: So, I mean, there
7 might be some ambiguity in the way it's phrased in terms
8 of do you have discretion to allow written questions to
9 witnesses. Anyway, I think the correct reading is that
10 once you start that, you've got mandatory, but did you
11 give any thought to whether the rule should have any
12 guidance, for example, in your situation --

13 HONORABLE TRACY CHRISTOPHER: My error?

14 HONORABLE DAVID GAULTNEY: Right, well, no,
15 but I think if the rule is going to be adopted statewide,
16 that's going to happen. More than once. Often. And you
17 will have questions, I think lawyers saying, "Well, this
18 says you must, Judge, and you didn't. And this is my key
19 witness," and so I wonder if the rule should have
20 something -- or should we just go with concepts of waiver
21 and --

22 HONORABLE TRACY CHRISTOPHER: Waiver.

23 HONORABLE DAVID GAULTNEY: -- or things like
24 that. You know, that was a question I had.

25 HONORABLE TRACY CHRISTOPHER: I can't tell

1 you, I put this like big post-it note on my computer
2 screen that said "Questions, questions," so I wouldn't
3 forget the next time, and I had my bailiff on alert
4 because he was in charge of the forms, and he was ready,
5 and the third witness rolled around, and I was about to
6 say, "Oh, yeah, see ya," you know, and everybody's like
7 "Judge, Judge, questions." Okay, okay, I forgot, I
8 forgot. I mean, the more you do it, obviously the more it
9 becomes part of your routine, but --

10 HONORABLE TERRY JENNINGS: But nobody
11 objects?

12 PROFESSOR ALBRIGHT: Yeah, if the parties
13 don't --

14 HONORABLE TRACY CHRISTOPHER: If nobody
15 objects, I would think you're okay, but --

16 CHAIRMAN BABCOCK: Yeah, Harvey.

17 HONORABLE HARVEY BROWN: I don't want to
18 beat a dead horse here, but I want to go back to Professor
19 Dorsaneo's question about anonymity. In a sense, the
20 comment is contrary to point (7) on page four. Point (7)
21 says it's in the record. That means it's not anonymous by
22 definition, so I think what you're trying to get at is two
23 things that you could address by just fixing the first
24 sentence of the comment.

25 One, I think you're trying to address the

1 timing. You don't want the lawyers to know and the
2 parties to know before the final arguments, basically, but
3 it's going to be in the record. It's not going to be
4 anonymous once the case is argued. So I think you could
5 say the timing, and the second, you're really trying to
6 keep it anonymous from a small group, i.e., the lawyers
7 and the parties, and I think you add --

8 MR. MEADOWS: I thought it was the
9 questioner.

10 HONORABLE JANE BLAND: Identity of the
11 juror.

12 MR. MEADOWS: The juror, not the question.

13 HONORABLE HARVEY BROWN: Yeah. Yeah. Did I
14 say the question? I meant the juror.

15 PROFESSOR ALBRIGHT: But they don't put
16 their name on it.

17 MR. MEADOWS: They don't put their name on
18 it.

19 HONORABLE HARVEY BROWN: Right. But, for
20 example, if they put their number, which some jurors do,
21 or if they all -- if the handwriting is given, they
22 actually read the form. They say "Judge, it says here in
23 part (7), I want to see the record, so today at the end of
24 the day I want to see those questions." You say, "Here
25 they are." They're going to be able to figure out pretty

1 quickly if it's all one juror or two jurors, and I don't
2 see any harm in clarifying when they get to find out and
3 to address the question that was asked earlier. Are you
4 trying to keep it anonymous from each other? No, you're
5 really trying to keep it anonymous from the lawyers so
6 they don't change their tactics.

7 CHAIRMAN BABCOCK: Yeah, Alex.

8 PROFESSOR ALBRIGHT: Well, it seems to me
9 that it's really impossible to keep it completely
10 anonymous unless a juror really wants to make sure that
11 that person is anonymous and manages to slip it to the
12 bailiff during a break without anybody seeing her do it.
13 So I think -- you know, I think what we're wanting is to
14 try to achieve anonymity to the extent we can, so I like
15 these words "to the extent possible."

16 HONORABLE HARVEY BROWN: I like those words,
17 too. I like those words, too. I was just trying to
18 clarify what we meant for the timing and who it's
19 anonymous from.

20 CHAIRMAN BABCOCK: Bill.

21 PROFESSOR DORSANEO: Well, I don't care for
22 those words. You just said a minute ago, Professor, that
23 it's not possible, so why do we say "to the extent
24 possible"? We're just saying foolish things.

25 CHAIRMAN BABCOCK: That's our habit.

1 PROFESSOR ALBRIGHT: Confidentiality. Maybe
2 confidentiality, their name is confidential. I don't
3 know.

4 PROFESSOR DORSANEO: Why don't -- the idea
5 of anonymity, it's a nice sounding word, but it's not a
6 very helpful word if what we're trying to do is to make
7 certain or to take steps in an effort to see that the
8 parties and counsel do not learn the identity of the
9 person who drafted the questions, the persons who drafted
10 questions. Why not just say that?

11 CHAIRMAN BABCOCK: Judge Christopher.

12 HONORABLE TRACY CHRISTOPHER: I actually
13 wonder whether the purpose is to keep the information from
14 the lawyers and the parties or whether the purpose is to
15 make the juror more comfortable in asking the question.
16 Okay. So I don't really know which thing we're trying to
17 protect here, truthfully, which is why I said, you know,
18 if you're sitting in the jury box and everybody is
19 watching. "Oh, they're writing a question," you know,
20 that makes a juror uncomfortable and might inhibit them
21 from asking a question. It's not really that I care that
22 you know which one of the jurors is asking a question. I
23 mean, I don't -- I wouldn't see anything particularly
24 wrong with that. I actually think the purpose is to make
25 the juror feel more comfortable about it.

1 HONORABLE TERRY JENNINGS: I think that's
2 right, because if you look at the proposed bill it says,
3 "The juror questions must be submitted anonymously," and I
4 think that's kind of the point, is to -- so that when it
5 is submitted and read to people in open court you don't
6 know which juror has done that, because you can't keep
7 anonymity in regard to the jury room unless, like Chip
8 said, you have these 12 booths that people go into and
9 then you don't know -- because you know if only one person
10 is asking a question and then you see someone writing it,
11 of course the jurors know who is asking a question.

12 HONORABLE TRACY CHRISTOPHER: Right.

13 HONORABLE TERRY JENNINGS: So I don't think
14 you can protect that.

15 HONORABLE TRACY CHRISTOPHER: Well, I mean,
16 I actually put this comment in in reference to the bill.
17 I'm happy with the rule without that comment, and then if
18 the bill passes with the word "anonymous" in it we can
19 struggle with it later.

20 CHAIRMAN BABCOCK: I like the comment,
21 frankly.

22 MR. LOW: I do, too.

23 CHAIRMAN BABCOCK: I think it gives a lot of
24 flexibility. Anything else? Okay. Well, we are just a
25 few minutes shy of our morning break, and since we're

1 going to go on to a new topic, why don't we take our break
2 right now?

3 (Recess from 10:27 a.m. to 10:42 a.m.)

4 CHAIRMAN BABCOCK: All right. We're back on
5 the record. We're going to go now to the Texas Appeals
6 Management and E-filing System, and Kennon has been
7 working feverishly on this, and I know we have just --
8 it's got a draft date of April 14th, but I think it was
9 just posted on our website on the 15th, so I don't know
10 how much time everybody has had to study this, but in any
11 event, Kennon is going to take us through it, and have at
12 it.

13 MS. PETERSON: Well, I thought it might be
14 helpful to start with just a really brief overview of
15 TAMES so that people understand the general components of
16 the project; and Bruce Hermes is the Director of
17 Information Resources at the Office of Court
18 Administration and taking the lead with TAMES, and so he's
19 here to give you an overview; and Mike Griffith, sitting
20 to his left, our right, is from Bearing Point and so can
21 address any questions about how e-filing works in
22 practice.

23 CHAIRMAN BABCOCK: Okay.

24 MS. PETERSON: Go for it, Bruce.

25 CHAIRMAN BABCOCK: So Bruce.

1 MR. HERMES: Thank you. Thank you all for
2 allowing me to speak with you today. I got awfully wet
3 coming over here, so I'm sorry for my appearance. I knew
4 when I got out of bed this morning that I was going to
5 have a bad hair day.

6 TAMES is a project that the Office of Court
7 Administration is doing for the 16 appellate courts of the
8 state. What we're doing is rebuilding the case management
9 system that's used in the several appellate courts, the
10 Supreme, CCA, and the 14 mid-level courts, and the major
11 theme of it is the e-filing into the appellate courts.
12 TAMES stands for Texas Appeals Management and E-filing
13 System, so that's what's really going to be the unique
14 part to folks outside the courts proper.

15 We have three major inflows that we
16 anticipate need to be included in that. The trial court
17 record, we will be able to accommodate electronically; the
18 court reporter's record, electronically; and, of course,
19 those filings from the parties. And so the rules -- apart
20 from the technology, the rules of court need attention to
21 enable all of these new inflows. Along with electronic
22 filing and all of the electronic communications going into
23 the court, we anticipate enabling electronic noticing to
24 the parties; and that has some other implications beyond
25 the outflow of that information, meaning that the folks

1 who receive electronic noticing need to keep up their
2 contact information, e-mail notices.

3 So some of the features that we would have
4 for the clerks would include electronic publishing on the
5 internet of court documents, including those documents
6 that I described as the inflows, intercourt data exchange,
7 such as when cases are transferred from one appellate
8 court to another or when there is an appeal to the higher
9 level, and, no, I'm not talking from a handout. These are
10 my own notes. The benefits of this we expect to be --
11 have some efficiencies within the courts. There would be
12 routing and delivering of the documents to chambers pretty
13 much immediately, once accepted by the clerk's office.
14 Judges and attorneys within the court would be able to do
15 text searches. They could simultaneously have the same
16 record in hand. Not that this would ever happen, but
17 there's never a misplacement of a record because it's
18 always on the server and can be retrieved. Folks don't
19 have to carry heavy boxes of records to wherever else they
20 may want to work outside of the office.

21 So those are some of the benefits. So we
22 need -- to the extent that we have e-filing coming into
23 the courts, that's going to be limited for some time to
24 come. We will need to accommodate incoming paper for a
25 long while until everything is electronic, and what we

1 have electronic even now in the trial courts is only civil
2 e-filing, so along with expanding in depth, we also need
3 to expand e-filing in breadth as well to include criminal
4 e-filing both at the trial court level and the appellate
5 court level.

6 So since there is going to be a number of
7 different ways for these documents to come in, we would
8 like for the courts to be able to handle a single way of
9 working, regardless of whether something arrived
10 electronically or whether it still arrives in the clerk's
11 office as paper on the counter or something coming in from
12 the mail. In order to enable that, everything would need
13 to be turned into electronic as it comes in so that on
14 downstream within the court it has a single way of
15 handling it. So our anticipation is if it doesn't arrive
16 electronically, it gets scanned and turned into
17 electronic, and so you're going to see a certain amount of
18 rule-making that needs to address how to even make sure
19 that the paper arrives in a way that it can be easily
20 converted into electronic, so that's why I'm setting up
21 that point.

22 So the touch points on the outside, trial
23 court clerk, either electronic or the way they prepare
24 their paper; the court reporter, either electronic or the
25 way they prepare their paper; and the parties, again,

1 electronic or the way they prepare their paper.
2 E-servicing, electronic service, will also come into play
3 where parties can serve one another electronically.
4 TexasOnline provides that service as well, along with
5 electronic filing. And then, as I mentioned, with the
6 internal or intramural touch points between courts for
7 transfers and appeals.

8 So that's kind of the setup for where we're
9 going with this. Whatever happens internally is one
10 thing, but where the rules all come into play has to do
11 with all those external touch points that you-all have a
12 hand in. Any questions at that level before we dive in?

13 CHAIRMAN BABCOCK: Okay. Yeah, Judge.

14 HONORABLE TRACY CHRISTOPHER: Has
15 TexasOnline or JCIT promulgated standards for the format
16 of documents?

17 MS. PETERSON: Mike can probably answer that
18 best.

19 MR. GRIFFITH: That's correct.

20 HONORABLE TRACY CHRISTOPHER: Have they?

21 MR. GRIFFITH: They have. The standard
22 right now is a PDF format that would go to the courts.

23 HONORABLE TRACY CHRISTOPHER: Okay. Do you
24 have any standards as to the quality of the PDF?

25 MR. GRIFFITH: Not currently. I think in

1 the rules that are before you for consideration at the
2 appellate level we do have a standard 300 DPI for scanned
3 images.

4 HONORABLE TRACY CHRISTOPHER: Why wouldn't
5 we have that for everything? Why wouldn't that be part of
6 JCIT's standards?

7 MR. GRIFFITH: We should. In fact, that is
8 our recommendation. It came out of the Harris County
9 district clerk's office, is that we add that not only to
10 the appellate rules but also for the district and county
11 level.

12 HONORABLE TRACY CHRISTOPHER: Because it's a
13 huge issue for me because, you know, we have been reading
14 nothing but electronic files for several years now, and
15 the quality of the PDFs varies so widely that sometimes
16 things are impossible to read without, you know, strict
17 quality control standards and some way to reject ones that
18 don't meet the quality control. It's very difficult.

19 CHAIRMAN BABCOCK: Impossible to read in
20 what way? That it's fuzzy or --

21 HONORABLE TRACY CHRISTOPHER: Fuzzy, shrunk,
22 are the two main issues.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE TRACY CHRISTOPHER: And even when
25 you use your computer, you know, blow up button you just

1 can't read it.

2 CHAIRMAN BABCOCK: Yeah, you expand it, and
3 it's so fuzzy you can't read it.

4 MR. HERMES: Judge, in those cases are those
5 -- they were filed electronically. Were those perhaps
6 printed and then scanned back into a computer from that
7 printed version? So that's not the issue?

8 HONORABLE TRACY CHRISTOPHER: Well, I don't
9 know, maybe.

10 MR. HERMES: It's my understanding that that
11 was once the situation.

12 HONORABLE TRACY CHRISTOPHER: No, no, not in
13 Harris County. No, these are new filings that are coming
14 straight computer to computer, and instead of looking like
15 that, it's like this and like that. (Indicating) It's
16 not readable; and I mean, we do a lot of reading on the
17 trial court level, but the appellate judges do even more
18 reading than we do; and, I mean, that's, you know, all day
19 long looking at a computer screen; and if it is not in
20 good computer format, it's going to be miserable for them.

21 MR. HERMES: If I may talk briefly about
22 that, there's two ways of getting such a PDF. One is to
23 get it -- to do your Word or WordPerfect document and then
24 save it directly as a PDF so you've got a text PDF.

25 Another way is to print it out, and then run it through a

1 scanner, so you don't even have text really. You have a
2 picture of text, and I'll guess that that's the scenario
3 that you're talking about.

4 HONORABLE TRACY CHRISTOPHER: Well, my guess
5 is that it is, so my suggestion really is that there needs
6 to be more in the rule that explains what quality needs to
7 be met, what quality control needs to be met. I mean,
8 it's a big issue for me, and I think it would just be a
9 horrible issue for the appellate judges.

10 CHAIRMAN BABCOCK: Mike, you said -- in
11 these proposed rules you say there is a standard?

12 MR. GRIFFITH: There is. I don't know the
13 specific rules, but it's on page seven, as I recall having
14 read the --

15 HONORABLE TRACY CHRISTOPHER: But I'm just
16 saying the local rules right now, they just say "PDF
17 format," and that is just pretty worthless.

18 MR. GRIFFITH: At the district that's right.

19 CHAIRMAN BABCOCK: Where is it, just for
20 curiosity, on page seven?

21 MS. PETERSON: It's subdivisions (4) and
22 (5).

23 MR. GRIFFITH: On the upper lefthand corner
24 it says "300 DPI."

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE TRACY CHRISTOPHER: And who is
2 going to police that?

3 CHAIRMAN BABCOCK: The DPI cops.

4 HONORABLE TRACY CHRISTOPHER: No, no, I
5 mean, seriously. At what point does that failure to
6 comply with that standard get policed?

7 MR. GRIFFITH: We will police that on the
8 TexasOnline and server provider.

9 MR. MUNZINGER: We can't hear you.

10 MR. GRIFFITH: We will police that on the
11 TexasOnline and service provider site before it's
12 delivered to the clerk.

13 MR. MUNZINGER: So but if it were filed not
14 in compliance, it could not be filed.

15 MR. GRIFFITH: Yes, that's correct.

16 CHAIRMAN BABCOCK: Justice Sullivan.

17 HONORABLE KENT SULLIVAN: Haven't the
18 Federal courts dealt with these issues before and had a
19 good bit of experience with them? I'm just curious as a
20 matter of best practices, I presume that Bearing Point and
21 JCIT have looked at that, and maybe it's worth 30 seconds
22 of background in terms of what other people have done in
23 disposing of these various images.

24 MR. HERMES: I did not. Kennon, did you
25 look at how the Federal rules address this?

1 MS. PETERSON: I know Blake has looked at
2 it, and there are Federal rules. I don't know that the
3 Federal rules address the quality of the scanned image,
4 though. I don't recall seeing that particular provision,
5 but I'll search for it and report back.

6 HONORABLE KENT SULLIVAN: But as a technical
7 issue they must have dealt with it.

8 MR. HERMES: Maybe we should take a look at
9 that.

10 HONORABLE TRACY CHRISTOPHER: I mean, when
11 you print and scan, your scanner quality makes a huge
12 difference in what the document looks like. You know,
13 saving your document and then converting it into a PDF
14 gives you the best quality, but then you don't have a
15 signature, and, you know, affidavits or things like that
16 have to generally be signed and scanned, so you couldn't
17 have just one -- you couldn't say everything should be
18 converted on the computer, but I really think that people
19 need to be told what resolution scanner --

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE TRACY CHRISTOPHER: -- they need
22 to own. Because, I mean, it is just -- it is a huge
23 issue.

24 CHAIRMAN BABCOCK: Judge Christopher, do you
25 have an opinion about whether the 300 DPI standard is

1 okay?

2 HONORABLE TRACY CHRISTOPHER: I have no idea
3 what that means. I'm just saying it needs to be clearer.

4 MS. PETERSON: And that was developed with
5 the Office of Court Administration to make it -- to ensure
6 that these documents will be legible. That's part of the
7 reason we worked with OCA along the way to get the
8 technical details right, and I think Scott Jones at OCA,
9 Bruce --

10 MR. HERMES: Right.

11 MS. PETERSON: -- thought this --

12 MR. HERMES: One of our programming managers
13 worked with us, and part of the reasons for the 300 dots
14 per inch, that's -- when you have a printed page, that's
15 the fineness of the ink dots that appear on there, 300
16 dots vertically and 300 dots horizontally in every square
17 inch; and one of the rationales for that was that that's
18 -- for one, that's a common resolution of laser printers,
19 and that is the resolution needed for scanning to a
20 quality that can be by computer understood and turned into
21 text with sophisticated computer programs that are called
22 optical character recognition that make sense out of
23 images of text and make text out of it, so that needs high
24 resolution at 300 DPI or above. Now, we don't
25 particularly like higher than 300 DPI because, that being

1 a squared figure, it increases geometrically the storage
2 requirements in the computer systems.

3 CHAIRMAN BABCOCK: Frank.

4 MR. GILSTRAP: Aside from legibility, there
5 is a big difference between a text document and a scanned
6 document in that you can word search the text document.

7 MR. HERMES: Right.

8 MR. GILSTRAP: And you can't word search the
9 scanned document. The Federal Fifth Circuit I think
10 requires the files be searchable. Is there any
11 requirement in here that the files be searchable?

12 MR. HERMES: Yes.

13 MR. GILSTRAP: There is? Where is it?

14 MR. HERMES: Well, I'll have to look at it.

15 MR. GILSTRAP: Just find it and give it to
16 me. Go ahead.

17 MR. HERMES: We will definitely get to it,
18 and that also goes to the point that I was making about if
19 you have it at the high enough resolution those computer
20 programs can turn it into text if it's not otherwise
21 messy.

22 MR. GILSTRAP: Okay. Okay.

23 CHAIRMAN BABCOCK: Yeah, Jim.

24 MR. PERDUE: To answer Judge Sullivan, my
25 experience, the -- this gets into a concept of creating a

1 fiscal note for whatever it is they're doing, but the way
2 you practice in Federal court, both district court and
3 Fifth Circuit, is there's a certification. You've got to
4 get two hours of training, you get the certification, but
5 to resolve this specific issue, once you do that then you
6 get a certified electronic signature, which removes this
7 issue of having to sign something and scan it, because the
8 real problem where the rubber meets the road is you print
9 it, you sign it, you scan it, and then you e-file it, as
10 opposed to being able to convert it straight out of Word
11 or WordPerfect to PDF and file it as an attachment to an
12 e-mail, because in the Federal system once you're
13 certified and you file it under your specific ID number
14 it's considered electronically signed.

15 MS. PETERSON: That's the same system that's
16 proposed in these rules. It's a digital signature, which
17 is an electronic unique identifier that you get upon
18 registering with TexasOnline.

19 MR. PERDUE: And but that's the appellate
20 rule.

21 MS. PETERSON: And it's also the lower court
22 rule.

23 MR. PERDUE: It would be in district court
24 rule.

25 MS. PETERSON: It's -- uh-huh.

1 MR. PERDUE: From my office at least, that's
2 the technology barrier, and if you resolve that as far as
3 electronic signature, you'll resolve the resolution issue.

4 MS. PETERSON: One of the things that's
5 interesting that I notice is that it has been resolved in
6 the JP rules, which were developed after the rules for the
7 district courts and county courts. That's where you
8 really see more information about the digital signature,
9 and I think that the template for the district and county
10 courts needs to be modified a little bit to address that
11 issue. But --

12 CHAIRMAN BABCOCK: Justice Bland. Unless --

13 HONORABLE JANE BLAND: What's the cost per
14 filing for the practitioners and how does it compare with
15 the cost in Federal court?

16 CHAIRMAN BABCOCK: Justice Hecht has a --

17 HONORABLE NATHAN HECHT: I'm afraid we're
18 getting into more details before we get an overview of the
19 project, because we want to -- we want to address all of
20 these questions, but we thought we would give you an
21 overview of the whole thing, where we're going first,
22 because we need to look at these in specific in the
23 context of what's presented to you. If I could --

24 CHAIRMAN BABCOCK: Yeah, go ahead.

25 HONORABLE NATHAN HECHT: -- take a minute.

1 Mike, tell us about the status of the electronic filing in
2 the trial courts.

3 MR. GRIFFITH: All right. Thank you,
4 Justice Hecht. In the trial courts, I think most of you
5 have a copy of the Texas map that shows the counties that
6 were currently -- have currently implemented electronic
7 filing. There is I think 39 counties, 52 clerks in those
8 counties, and 315 courts. Those include, I think the
9 numbers are -- the 315 courts break out to 221 district
10 courts, 76 county courts at law, 9 probate and 9 justice
11 courts. The justice courts rules were just approved about
12 a year ago, and we're slowly bringing those courts up
13 right now. The total volumewise, we're up over about
14 375,000 filings that we've processed through the system so
15 far. We're running right now about 20,000 filings a
16 month.

17 HONORABLE NATHAN HECHT: So the rules draft
18 that you have before you comes from a task force, none of
19 the members of whom are here, except for Kennon.

20 MS. PETERSON: Richard Orsinger is on it.

21 HONORABLE NATHAN HECHT: Richard is at the
22 Supreme Court course this morning, but, help me, Chief
23 Justice Hedges --

24 MS. PETERSON: Uh-huh.

25 HONORABLE NATHAN HECHT: -- is the chair of

1 it. Chief Justice Thomas is on it. Who else?

2 MS. PETERSON: Judge Harvey Hudson, who I
3 believe was at the 14th Court of Appeals before retiring
4 and was also an appellate practitioner, criminal side,
5 before that. Ben Mesh, he's an appellate practitioner at
6 Haynes & Boone. Amalia Rodriguez-Mendoza who is the
7 Travis County clerk, and as some of you probably know,
8 e-filing is mandated in Travis County for most documents,
9 and so she's on there because she's been dealing with
10 e-filing quite a bit. David Slayton, who is the court
11 administrator in Lubbock County. He was chosen in part
12 because Lubbock County adopted this Court's proposed rules
13 of judicial administration regarding sensitive data and
14 e-access, and so he's dealt with that component of the
15 process.

16 Richard Orsinger, Blake Hawthorne, Chris
17 Prine, who is the clerk at the 14th Court of Appeals, and
18 Bruce Hermes was on it. Sian Schilhab, I hope I'm
19 pronouncing that correctly. She's the general counsel for
20 the Court of Criminal Appeals. Louise Pearson, who is the
21 Court of Criminal Appeals clerk, and then people who
22 attended some of the meetings and participated in the
23 drafting to a certain extent, Carl Reynolds, the head of
24 the Office of Court Administration; Mina Ramon, who is the
25 general counsel for the OCA; Scott Jones, Bill Carlson,

1 Yolanda Aleman, all at OCA; and Gary Castiner participated
2 in the last meeting. He's working part time for OCA
3 through the session.

4 HONORABLE NATHAN HECHT: So the idea was to
5 try to bring the appellate process in the 16 appellate
6 courts under a comprehensive management, case management,
7 docket management, internal management system that
8 different courts can modify because of the size of the
9 court, the way they do their business, whatever, but to
10 try to bring the -- some unit in comprehension to the
11 whole thing, and the starting place was the electronic
12 filing template that this committee worked on and approved
13 some years ago and is now operating in all of the district
14 and county courts that Mike mentioned and that are shown
15 on the map.

16 Then the -- two years ago Tom Lawrence and
17 his group took that template and, with the legislative
18 encouragement of creating electronic filing rules for the
19 justice courts, created those rules using that same
20 template but refining it and trying to make it applicable
21 to the justice courts.

22 So the thought, the basic thought, was we've
23 got something that's working pretty well. There are
24 always going to be filing issues and what happens if the
25 computer goes down and who dropped the ball and how do you

1 prove it and what are the costs and how much do people pay
2 and those issues that will always be revisited from time
3 to time, but the basic structure was just moved over to
4 the appellate side. So to -- so it's as good as or as
5 weak as the system that is in place presently, and then
6 the -- and there are several questions that we need input
7 on, and it will probably take a while to get it, because
8 this is a huge step.

9 CHAIRMAN BABCOCK: Input from whom?

10 HONORABLE NATHAN HECHT: This committee.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE NATHAN HECHT: The Court needs
13 input from the committee on all these issues, and there
14 are some comprehensive issues that I want to mention
15 before we get to the details, which are should it be
16 mandatory or permissive. Should we just make this
17 available to lawyers or should we require them to follow
18 it with exceptions, like for pro ses or something like
19 that?

20 The practice at our Court now is that if you
21 have a case to be argued we ask you to send an electronic
22 copy of your brief to the Court, which the Court posts on
23 its website, and the Court has those briefs available, but
24 so do -- so does everybody else, and there's no provision
25 in the appellate rules for that. We just -- the clerk

1 asks you to do that, and so we have already briefs in
2 hundreds of cases that are being submitted electronically.
3 So is now or the near future a good time to say this is
4 the way filing has to be done in the appellate courts in
5 Texas, or should we just step back from that and say, no,
6 let's try it a while and see if there are other problems
7 and then make it more mandatory with exceptions?

8 And there's several components to that
9 question because of the different actors in the appellate
10 process. One is the lawyers, how mandatory should it be
11 for the lawyers. Second, how mandatory should it be for
12 the clerks, because at some point I think it is desirable
13 to get the appellate record from the trial court clerk in
14 electronic form, every time, no exceptions. It's a
15 government problem. It's not a -- it's not a pro se
16 problem. When do we ask the trial court clerks to submit
17 that?

18 Well, you probably know already that common
19 printers, three-way printers and photocopiers will scan
20 documents as well as photocopy them, so the technology is
21 very common and available to people on a routine basis.
22 That's not to say in 254 counties everyone has it, but
23 when should we expect that they get it. And then
24 reporters, they are the third participants, and already --
25 David's not here today, I don't think, but --

1 HONORABLE TOM GRAY: He has his designee,
2 however.

3 HONORABLE NATHAN HECHT: Ah, good. Already,
4 far and away most of the reporter records are in
5 electronic form at some point in the process, and so when
6 should there be a requirement that those be filed only in
7 an electronic form. So we have those issues about how
8 mandatory to make this, how fast. We have an issue,
9 should we have a pilot project with just one or two courts
10 and see how that works and then ease into it, or are we
11 comfortable enough with the operation of the system in the
12 trial courts that are using it already to go ahead and
13 begin to migrate to the system with all 16 courts.

14 Then there is another issue, to what extent
15 will there continue to be paper filed. The proposed rules
16 that you have in front of you take a conservative
17 approach, and as a known liberal, I favor a broader
18 approach, but I wonder to what extent we should not begin
19 to wean ourselves off paper in this process completely, at
20 least leaving the individual participants, the judges, the
21 law clerks, people who want to look at a piece of paper,
22 hold it or walk around with it or highlight it or mark it
23 up or whatever, the full opportunity to do that but not
24 require a filing of any kind of piece of paper.

25 The draft rules continue to provide for the

1 filing of at least one paper copy. Of course, there are
2 side issues about is every piece of paper different.
3 That's far more complicated in the trial court system than
4 in the appellate system because you have returns of
5 service, you have Rule 11 agreements, which you sometimes
6 have in appellate cases but not so often. You have
7 summary judgment affidavits. You have all sorts of things
8 that happen in the trial court, verified pleadings that
9 you don't have so much of in the appellate system, so to
10 what extent do we need to differentiate between those
11 kinds of documents and require just a digital signature,
12 just what we talked about earlier, the authorization to
13 file as opposed to a scanned John Hancock that may have
14 some liability attached to it.

15 And the courts already take different views
16 of this issue; and you'll see in the draft rules it's
17 proposed that the Supreme Court only get one piece of
18 paper for everything that's filed, and one copy; and I
19 think Blake, our clerk, would prefer that was zero, but
20 that's his view; and the Court of Criminal Appeals wants
21 11, just like they've been getting; and the courts of
22 appeals no doubt will have at least 14 views and probably
23 closer to 80 or more, since there are 80 judges.

24 MS. PETERSON: Can I say one thing about the
25 copies?

1 HONORABLE NATHAN HECHT: Yeah.

2 MS. PETERSON: This is actually an editing
3 oversight on my part. In the number of copies provision,
4 it's 9.3, initially there was a section for paper filings.
5 This is on page eight. There was a subdivision for paper
6 filing and a subdivision for electronic filing.

7 HONORABLE TERRY JENNINGS: What document are
8 you looking at?

9 MS. PETERSON: Sorry, the TRAP amendments,
10 so it's all the Rules of Appellate Procedure.

11 HONORABLE TERRY JENNINGS: What's the title?

12 MS. PETERSON: It is "Draft Amendments to
13 Texas Rules of Appellate Procedure." It's dated April
14 14th, 2009.

15 HONORABLE JANE BLAND: Kennon, could you
16 please use a rule number, because some of us are looking
17 at the marked up copy and some of us are looking at the --

18 MS. PETERSON: Sure. Sure. It's 9.3(a).
19 And initially there was a separate subdivision for
20 electronic filing that did require a hard copy of
21 everything that was filed electronically, but at the task
22 force level they said let's just take that out and not
23 require a hard copy of everything that's filed
24 electronically, and so I did take that, that language out,
25 but did not put back in some language to specifically say

1 you don't have to file a hard copy of what's been filed
2 electronically, and so that was the decision at the task
3 force level, and it was an editing oversight on my part
4 not to explicitly state that a hard copy is not required
5 of documents that have been electronically filed.

6 HONORABLE NATHAN HECHT: But that leads me
7 to say that what you have in front of you is the work of
8 this task force and Kennon's drafting, but -- and the
9 general imprimatur of the appellate system, we haven't
10 gone around and polled everybody, but the appellate clerks
11 have been talked to. Everybody is -- has some input so
12 far, so this is sort of an approach that can be taken, but
13 this is very malleable at this point, and how far we go
14 and how fast we go depends to a great extent on what this
15 committee thinks. I think on my own Court there is some
16 interest in moving along, and I think my census on the
17 Court of Criminal Appeals, there's some sense in moving
18 slower, and so -- more slowly, and so there's a -- and I'm
19 sure the courts of appeals, as I say, feel differently
20 about this.

21 So when we're looking at this, these are not
22 proposals that, you know -- there's a lot of philosophy
23 and policy that needs to be decided while we're looking at
24 the details of the rules, and then finally the issue that
25 Jane raised about fees, it's not clear whether to charge

1 and how much to charge, and that issue the courts feel
2 differently about that. Some feel quite strongly that
3 there should be no charge and there should not be a
4 convenience fee for this, that filing fees would stay the
5 same.

6 There are others who believe that the
7 convenience fee should be added to the filing fee and
8 should be in addition to every document. There will be,
9 of course, a service fee that will be charged by the
10 filing operation, the service provider and TexasOnline, so
11 there will be that charge; but, query, should the courts
12 charge an extra charge; and part of the answer to that
13 question depends on whether the money goes to the courts
14 or to general revenue; and so perhaps you can see the
15 issue there; and that's not clear. So is it a good idea
16 to have a convenience fee charge or not, and this is a
17 very important policy issue, because you have probably
18 seen recently that Senator, from Connecticut, Lieberman --

19 MS. PETERSON: Lieberman, yeah.

20 HONORABLE NATHAN HECHT: -- asked Judge
21 Rosenthal to answer why the convenience fee filing fee in
22 the Federal system is still as high as it is when it is
23 not -- does not appear necessary to defray the expense, so
24 it's not just us that's looking at this. It's an access
25 to justice issue, but also at the same time what

1 frequently happens without some money involved, that it
2 may be difficult to make all of these implementations. To
3 provide flexibility on the front and back end, but
4 particularly the back end where judges are using what's
5 been sent them, it will probably even be necessary into
6 the foreseeable future to print things out for -- a judge
7 wants it printed out, we're going to print it out, and
8 there will be a cost associated with that that is probably
9 not there now or being born by somebody else.

10 So, query, does that need to be worked in or
11 how much does it amount to, and those are the kinds of
12 issues that we need some help on, and you have the text,
13 and what Kennon did and what I thought was a good idea was
14 to give you a set of the appellate rules with the changes
15 marked. There are a lot of changes in Rule 9, for
16 example, that has to do with filing things and not so many
17 in the back part of the rules that don't have anything to
18 do with that, but at least you can see the overall, and
19 probably in the future we'll just stick to the rules that
20 are being changed, but at least here you have a whole --
21 you can step back and take a look at the whole thing and
22 how it's affected.

23 CHAIRMAN BABCOCK: Justice Hecht, a couple
24 of things. When you said the people involved or the
25 stakeholders, you mentioned lawyers, clerks, reporters.

1 You're going to have pro se litigants, would be another
2 important category, wouldn't they?

3 HONORABLE NATHAN HECHT: Yeah, and some
4 accommodation has to be made for that, but do we say the
5 paper that is sent in by a pro se, they can only be sent
6 in because they are pro se and not because they're just
7 recalcitrant? Do we scan that at the front part of the
8 system so that when it goes past the clerk's desk it's
9 still electronic from then on out? Those kind of things.

10 CHAIRMAN BABCOCK: Okay. And secondly,
11 would you find it most helpful if we went down this list
12 and talked about the broad issues, or do you want us to
13 dig into the specific rules one by one and let the
14 philosophy of this committee emerge from that discussion?

15 HONORABLE NATHAN HECHT: I want to get some
16 feel for what the sense of the committee is about the
17 broader issues, but I also know that when you start
18 looking at the details it will provoke thoughts about how
19 that's really going to work that don't arise just when
20 you're sitting there thinking about it in the abstract,
21 but it might be good to get some sense about some of these
22 issues before we delve in, because, for example, if you
23 just look at the first page, I mean, things like "digital
24 signature" and whether that's defined properly or not, you
25 know, we need to get that right, but that's a fairly

1 technical issue.

2 CHAIRMAN BABCOCK: Uh-huh. Okay. Well, the
3 first thing that you mentioned in a broad way was
4 mandatory or permissive. Is that a broad enough topic to
5 talk about?

6 HONORABLE NATHAN HECHT: That's pretty
7 broad, yeah.

8 CHAIRMAN BABCOCK: Okay. Kennon, did you
9 have any way you wanted to frame that issue or --

10 MS. PETERSON: Well, I think it's good to
11 start with whether it's mandatory or permissive by the
12 lawyers, so then maybe just taking it in the order in
13 which Justice Hecht presented.

14 CHAIRMAN BABCOCK: Okay. That's good.
15 R. H.

16 MR. WALLACE: Mandatory filing in Federal
17 courts and bankruptcy courts is already pervasive. I
18 mean, there's no options in most courts, so I would
19 suggest that you eventually want it to be mandatory. Now,
20 what period of time, you may want to give notice that
21 that's going to happen, but it is -- electronic filing,
22 once you get used to it is so great, there's no reason not
23 to make it mandatory. And you just simply make exceptions
24 for pro se litigants that they file theirs by paper.

25 CHAIRMAN BABCOCK: If they want.

1 MR. WALLACE: In the rules, yeah.

2 CHAIRMAN BABCOCK: Yeah, Carl.

3 MR. HAMILTON: It isn't mandatory now in the
4 trial courts, so what's the reason for the difference in
5 should it be mandatory in the appellate courts?

6 HONORABLE NATHAN HECHT: The reason it's not
7 mandatory in the trial courts is a practical one. There
8 are just too many differences in too many counties and too
9 many different things get filed in too many places. It's
10 just very difficult.

11 On the Federal side, the Federal system
12 started with mandatory filing in the trial courts and have
13 not focused at all on the circuits because they have
14 wanted to implement it from the ground up, and part of
15 their thinking has been that once the PACER system
16 accomplishes all it's designed to do, it pretty much takes
17 care of all of the appellate system, except for the briefs
18 and any motions, because the record, the pleadings, are --
19 now, as I understand it, the circuit judges routinely
20 access the pleadings in the case through PACER and not
21 through a record that's sitting in a box in their
22 chambers.

23 So but on our side there's only 16 appellate
24 courts. We're only dealing with 98 judges. We've only
25 got 16 clerks. It's much easier to implement. We're only

1 dealing with 12, 14,000 cases. It's much easier to
2 implement than it would be on the trial side.

3 MS. PETERSON: And I think Travis County --
4 and, Mike, you might be able to chime in and tell me more,
5 but I believe a lot of the filing in Travis County is
6 mandated to be electronically filed.

7 MR. GRIFFITH: That's correct. In the
8 Travis County district courts, the civil cases, about 90
9 percent of those right now are mandated, excluding family.
10 There is no mandate on the family side, but on the civil
11 side there is.

12 MS. PETERSON: And are there any other
13 counties where that's the case?

14 MR. GRIFFITH: No. That's pretty much it.

15 CHAIRMAN BABCOCK: Alex.

16 PROFESSOR ALBRIGHT: We're talking about
17 filing briefs, right, electronically? Are there any
18 briefs that anybody gets now that are typed on a
19 typewriter? Yes?

20 HONORABLE TOM GRAY: Yes.

21 HONORABLE NATHAN HECHT: Pro se.

22 CHAIRMAN BABCOCK: Pro se.

23 PROFESSOR ALBRIGHT: So the only ones that
24 would be difficult, I'm trying to figure out as a
25 practical matter what we're talking about. If you have a

1 brief that's typed on a typewriter, to file it
2 electronically you have to scan it and file it, which I
3 think you can do at Kinko's, right? Or the equivalent.

4 HONORABLE TOM GRAY: Unless you're in jail.

5 PROFESSOR ALBRIGHT: Unless you're in jail.

6 That's the only thing, typewriters for prisoners, but, I
7 mean, it seems to me that it should be mandatory, but
8 there should be somewhere where you can ask for permission
9 for special consideration. "I'm in prison, and I only
10 have a typewriter, and I have no access to the internet."

11 I have a feeling that prisons are going to
12 have to have some kind of computer labs one of these days,
13 because, I mean, everybody -- I mean, you hear about
14 people looking for jobs, and they're doing it -- they go
15 to the library, and they do it over the internet, and I
16 would think most people who are filing briefs are doing it
17 on the computer, and if they are filing it on paper
18 instead of electronically it's because they just don't
19 want to, and it may be time that they learn.

20 I mean, so much of this you just have to
21 kind of push the technology to get people to do it, and
22 you know the world is such that it's -- we have to push
23 electronic filing. I'm on a strategic committee, planning
24 committee, for IT at the university, and, you know, it
25 grows -- the technology grows so much every year, every

1 month, you can't really keep up with it, but if we're
2 requiring people to file things in paper, anything in
3 paper in five years, it's going to be just ridiculous.

4 CHAIRMAN BABCOCK: Sarah, didn't you have
5 a --

6 HONORABLE SARAH DUNCAN: I was just going to
7 add to what Justice Hecht said, Carl. The other
8 consideration, and one that's big to me, is that our
9 appellate system is state-funded, whereas the trial system
10 is county-funded; and it's one thing to impose on that
11 many counties that you go -- you know, I can imagine,
12 Alex, that there are people in Cochran County who don't
13 have a Kinko's or a scanner at the library.

14 PROFESSOR ALBRIGHT: And that's -- I think
15 for trial courts that's a different question.

16 HONORABLE SARAH DUNCAN: Right. I'm just --

17 PROFESSOR ALBRIGHT: If you're filing an
18 appeal in a -- you at least have to -- if you're not
19 filing electronically you've got to find a Xerox machine
20 that will make you 12 copies if you're filing in the
21 Supreme Court or the court of appeals. You know, that's
22 technology right there that we're imposing on people, and
23 that's probably more expensive than to file electronically
24 without any paper copies.

25 HONORABLE SARAH DUNCAN: I'm not taking a

1 position on the mandatory or permissive. I was just
2 pointing out that that's one reason to distinguish the
3 appellate system from the trial court system.

4 CHAIRMAN BABCOCK: Justice Jennings, then
5 Justice Sullivan.

6 HONORABLE TERRY JENNINGS: Just the broad
7 philosophical issue, I'm hearing some words that really
8 disturb me as a Luddite. The first is mandatory,
9 paperless being inevitable, pushing people to go into this
10 technology against their will. Just to kind of give
11 you-all a little background, and I don't want to belabor
12 this point, but we are a very high volume court, and there
13 is disagreement on our court about how this should be
14 handled, and some of the judges on my court are very
15 concerned about this idea that somehow we're going to all
16 be paperless in five years, and if you're not, you're
17 behind the times, you're a dinosaur.

18 Every week each judge on our court -- you
19 know, we sit in panels of three. Each judge, the default
20 is to try to handle two cases a week. So that's, you
21 know, three judges, two cases a week, that's at least six
22 briefs you're reading, and then if you throw in reply
23 briefs -- excuse me, that's at least 12 briefs you're
24 reading, and if you throw in reply briefs you could be
25 reading as many as 18 briefs a week to prepare for your

1 presubmission conference.

2 On top of that you have case law and
3 statutes that you're reading, and in order to read these
4 briefs and these cases and to be prepared for an
5 intelligent discussion for my presubmission conference I
6 have to have this paper in front of me. I read briefs
7 together. I can't read two 50-page briefs and a reply
8 brief on a computer screen and intelligently discuss it in
9 a presubmission conference. I can't do it. You know, if
10 you want me to gloss over the issues and get a gut feeling
11 about a case and issue a gut ruling, you know, yeah, but
12 this idea that you can force judges to get everything they
13 need to prepare on a case on a computer screen, with all
14 due respect, that's ridiculous.

15 PROFESSOR ALBRIGHT: Oh, I'm totally with
16 you. I keep everything on my computer, but I print a lot
17 of stuff out, and so one real issue is who's going to bear
18 the cost of the printing.

19 HONORABLE TERRY JENNINGS: And it's not just
20 the judges. Believe it or not -- and believe me, there
21 are great advantages to electronic filing. I go to the
22 Supreme Court website, I get the briefs, and I love to see
23 what lawyers are saying about my opinions. I listen to
24 the oral arguments. This stuff is wonderful, and I
25 appreciate all that, but I'm very concerned about what

1 seems to be kind of this agenda that we're going to go
2 paperless, and it's not just the judges. It's the staff
3 lawyers. It's great to go through a record and be able to
4 do a word search, but I've talked with my staff lawyer and
5 other staff lawyers, and you know what, when lawyers file
6 briefs and they talk about the facts, sometimes the facts
7 aren't quite what they say they are, and it's nice to have
8 a hard copy of a record that you can go through and tab,
9 and I've been in situations before where, you know, people
10 have their computer screens up, and I respect that, and it
11 slows the conversation down.

12 It's much faster for me to pick up a brief
13 that I have tabbed and highlighted, and I can say, "Look,
14 you argued this, I'd like to ask you a few questions about
15 that." Rather than wait for somebody to do their word
16 search and find it on a computer screen. There is a lot
17 to be said for paper, and it makes my job easier, and it's
18 not just because I'm a Luddite or a paleoconservative. I
19 am, but it really makes the job more efficient, and I
20 think we really need to be concerned in this society where
21 people are starting to think in sound bites, and they're
22 completely missing the entire context.

23 You know, young kids today as they're coming
24 out of law school and they're being briefing attorneys and
25 clerks on the court, they're trained with these computers,

1 and they see something, and they highlight it, and they
2 cut and paste it, and they stick it in, you know, a memo
3 of law, and you go and you look at the case, and it
4 doesn't say what they think it says, and people are being
5 trained to think this way. So this whole electronic
6 revolution, there is a huge downside to it, and I've said
7 my piece.

8 MR. HAMILTON: Amen.

9 CHAIRMAN BABCOCK: In a lengthy sound bite.
10 Justice Sullivan.

11 HONORABLE KENT SULLIVAN: I appreciated
12 Sarah's comment that there are issues that are unique to
13 the state system that we need to take into account so that
14 the Federal experience is certainly not a perfect analog.
15 One thing that occurs to me is the extent to which we've
16 looked at what other states have already gone to mandatory
17 or near mandatory filing. One concern that I have is we
18 seem to have this discussion as if we are in a vacuum and
19 that we're the only people headed down this road, and it
20 seems to me there are probably many other people who are
21 heading down this road, some of which maybe are way down
22 the road, and I don't know. Maybe Kennon knows the answer
23 to that in terms of some other state that has completed
24 this process.

25 It just occurs to me that even questions --

1 you know, Terry's not the only dinosaur, you know. There
2 are many of us around, and the reality is, is that as a
3 practical matter, if some state is five or even ten years
4 ahead in the process, they've probably dealt with the
5 issue of how to accommodate someone like Justice Jennings,
6 and we ought to find out how they accomplished that and
7 use best practices to our advantage.

8 HONORABLE TERRY JENNINGS: They have. It's
9 called written briefs.

10 HONORABLE KENT SULLIVAN: I'm not quite on
11 that same page.

12 CHAIRMAN BABCOCK: Judge Christopher, then
13 Justice Bland.

14 HONORABLE TRACY CHRISTOPHER: I don't think
15 we should increase the costs, and to the extent that the
16 Court of Criminal Appeals still wants 11 briefs, paper
17 briefs, and we're going to impose this TexasOnline fee,
18 that's wrong, it seems to me, because we're just
19 increasing costs. So you can't look at them just one way
20 or the other without understanding what the rule is going
21 to end up being.

22 Also, again, I'll just say to you, the
23 quality is key to reading things on the computer, and all
24 of those things have to sort of be in place before you
25 decide whether it's permissive or mandatory. I think

1 we're kind of making -- putting the cart before the horse.

2 CHAIRMAN BABCOCK: Justice Bland, and then
3 Sarah.

4 HONORABLE JANE BLAND: Well, I think that
5 electronic filing is great for electronic storage, for
6 accessing the record, for finding the record, for the
7 keeping everything in the clerk's office done uniformly
8 and routinely across the state. I have the same concerns
9 Judge Jennings has about eliminating printed briefs
10 because I am my own secretary. I printed out this stuff
11 for this meeting today, so if I have to print something
12 out and we have a -- we have I guess a model version of
13 this that everybody is using I think to build this TAMES
14 project.

15 We have a -- some software that Harris
16 County bought -- Harris County built for the First and the
17 Fourteenth Court of Appeals that's electronic circulation
18 software, and it's great for keeping track of how we're
19 voting and keeping our opinions on the server and being
20 able to search and find an opinion, an earlier opinion,
21 but if I need to read a 50-page brief or a 50-page draft
22 that has changed significantly from an earlier idea of how
23 to go in an opinion, I print it out, and I'm now spending
24 a fair amount of my day everyday printing stuff out that I
25 need to read that I didn't used to have to do, and I am

1 not a Luddite. I use the computer all the time. I revise
2 on the computer, but my eyes can't take it.

3 I have a physical limitation, and I don't
4 know, maybe the Kindle will solve that problem, but there
5 are only so many hours a day I can stare at a computer
6 screen, and so I worry that's going to be my whole life,
7 is just staring at a computer screen. I would rather take
8 my briefs and be near a window and read them, and maybe
9 the Kindle will solve that problem, but I don't have a
10 Kindle, so I don't know.

11 CHAIRMAN BABCOCK: Well, and the briefs
12 aren't on the Kindles yet either, so Sarah.

13 HONORABLE SARAH DUNCAN: They will be,
14 though.

15 CHAIRMAN BABCOCK: Judge Jennings wants to
16 know what a Kindle is.

17 HONORABLE TERRY JENNINGS: I know what a --
18 there's even a Kindle 2. They'll never replace books.

19 PROFESSOR ALBRIGHT: And, by the way, you
20 can read Word documents on your Kindle, so you can get
21 your brief sent to your Kindle.

22 HONORABLE SARAH DUNCAN: And you can adjust
23 the size of the type on the Kindle.

24 HONORABLE JANE BLAND: It's not the size of
25 the type. I've fuddled with everything. It's the light.

1 HONORABLE SARAH DUNCAN: I understand.

2 HONORABLE TERRY JENNINGS: And it's the idea
3 of being --

4 HONORABLE JANE BLAND: When I'm driving home
5 and stop lights and street signs that I can see perfectly
6 fine in the morning are fuzzy, and it's because I've been
7 looking at a computer screen all day. I mean, you know.

8 HONORABLE SARAH DUNCAN: And that is a fact
9 of all of our lives. I mean, I do stare -- I think most
10 of us stare at a computer screen most of the time I'm
11 awake, but it's not simply a function of tacking on a
12 convenience fee or a service provider fee, because there
13 are going to be tremendous savings to the parties and the
14 lawyers with online filing. You don't have postage, you
15 don't have paper, you don't have ink, you don't have
16 couriers.

17 At the same time I think to some extent this
18 will shift the costs. It's just like when the system for
19 this committee changed, and I used to get -- we used to
20 get our materials in the mail, and it was marvelous, and
21 we could take that big book around with us everywhere, and
22 like you, Jane, I spent an unbelievable amount of time at
23 the court preparing for these meetings because I couldn't
24 ask anyone at the court to do that. I did it. I now have
25 somebody who actually prepares me a book, and it's

1 wonderful. I don't think electronic filing is going to
2 make anybody, Luddite or paleoconservative or whatever you
3 may be -- you can't make somebody use an electronic
4 format.

5 At the same time, the court system is not
6 going to be able to continue to provide the level of
7 service it wants to provide if its funds are being cut by
8 the Legislature, case filings are growing, and storage
9 costs, which are huge, are increasing. I mean, I don't
10 know what they do in Houston or Fort Worth or Dallas or
11 anything else. In Bexar County the Fourth Court of
12 Appeals has to pay its own rent and is constantly being
13 faced with being kicked out of the building, and it has to
14 pay its own storage costs, and they're huge, and there's
15 not much you can do by statute with getting rid of those
16 storage costs, except go to something like electronic
17 filing, so I --

18 HONORABLE JANE BLAND: Well, I agree with
19 you, and I think it's perfect for that. We have to have a
20 solution, though, for need for that -- that for some --

21 CHAIRMAN BABCOCK: Kennon.

22 MS. PETERSON: I think it might be good to
23 point out in 9.3(a), again, that there is a provision that
24 allows courts of appeals by local rule to require the
25 filing of more or fewer copies of any document, other than

1 a petition for discretionary review. So, I don't know, it
2 looks like you don't agree with that as an option, but if
3 e-filing were mandated, the courts of appeals could still
4 require a certain number of hard copies.

5 HONORABLE JANE BLAND: But I agree with
6 Judge Christopher. I mean, here we're going to -- if
7 we're going to make electronic filing mandatory or even
8 offer it, the tradeoff ought to be that they should not
9 file 11 copies. The lawyer shouldn't have to file 11
10 copies of a brief. I just think that we have to come up
11 with some solution for the actual use of all of this stuff
12 that gets filed, you know, and stored.

13 CHAIRMAN BABCOCK: Richard, then Bill, and
14 then Roger.

15 MR. MUNZINGER: God is very good to me. I
16 don't do any of these things except type the brief and
17 then I tell somebody else, "file it and do whatever." I
18 wouldn't have the least idea how to file in Federal court
19 or state court or anything else, and God being good, I
20 won't know when I die. So that raises this question that
21 I have. To be a lawyer, you know, anywhere in Texas and
22 to comply with mandatory e-filing do I need anything other
23 than a PC and a connection to the internet, or must I buy
24 or acquire some kind of OCR thing that is fancy and
25 expensive that does this for me?

1 If all I need is a PC and an internet
2 connection, I don't have any problem with making it
3 mandatory once we iron out these other things, but before
4 we get to that level I need some assurance that people in
5 my jurisdiction, for example, who are scrambling to make a
6 dime to cover their overhead don't have to go out and do
7 something to do this.

8 MS. PETERSON: They don't have to go out and
9 do anything.

10 MR. MUNZINGER: So all I need is a PC and an
11 internet connection?

12 MS. PETERSON: My understanding is the
13 conversion occurs either at the EFSP -- is it at the EFSP?

14 MR. GRIFFITH: That's correct.

15 MS. PETERSON: Okay.

16 MR. GRIFFITH: You need a computer with
17 internet connection and a browser. That's really all you
18 need. For scanned documents such as Justice Hecht
19 mentioned, Rule 11 agreements that have to have multiple
20 parties' signatures, if you've got a printer that can scan
21 that in at 300 DPI so it's readable then that --

22 MR. MUNZINGER: Well, but that's my
23 question. It's nothing to Baker Botts or my firm to buy
24 one of these things. What is it to an individual to have
25 one that does what you said? I'm Richard Munzinger, and

1 I've got a little old office in my corner shop somewhere,
2 and I'm scrambling to do divorce work, and I've got all
3 kinds of confidentiality problems and all kinds of things
4 going on in my law practice, and some guy in Austin says,
5 "Hell, all you need is a 300 so-and-so," and it cost me a
6 thousand dollars. I don't know that. That's my question.

7 PROFESSOR ALBRIGHT: I have one at home, and
8 I think it cost about three or four hundred.

9 MR. GRIFFITH: 200 or \$300.

10 CHAIRMAN BABCOCK: Okay. Where were we?
11 Bill, and then Roger.

12 PROFESSOR DORSANEO: I would like to have
13 some idea from -- let me start that a little differently.
14 I am quite sure that a lot of what I file in appellate
15 courts is not read, and that's --

16 HONORABLE NATHAN HECHT: But it's just your
17 stuff, though, Bill.

18 PROFESSOR DORSANEO: And I'm pretty sure
19 that it's routine that reply briefs are not read, and
20 that's -- I find that very disturbing, so I think anything
21 that would increase that phenomenon is a bad idea; but
22 then again, I'm told that this is like -- kind of like
23 quitting smoking. You know, once you really get used to
24 it it's going to be great, and I think that makes a lot of
25 sense, but I want to make certain that the appellate

1 judges can function in the way that they should, and
2 that's my biggest concern with making it mandatory or
3 going to this process.

4 I think the last couple of years at the
5 appellate judges conferences, Appellate Judges Education
6 Institute, we did away with CLE written materials, and
7 it's now all on a CD, which, of course, nobody can access
8 at the presentation, and I'm sure it's like a pointless
9 exercise to even prepare these materials and have them put
10 on this CD because it's just going to go on a shelf, and
11 it would be unlikely that anyone would really ever look at
12 it, and that's what I think can happen. It doesn't shrink
13 in size. It gets bigger and bigger, but then it's ignored
14 because there's just too much to do.

15 CHAIRMAN BABCOCK: Roger, then Judge
16 Christopher, then Justice Jennings.

17 MR. HUGHES: Well, personally it does not
18 offend me to say you're going to pay a user fee and then
19 you're going to serve enough copies so the judges who like
20 paper can read them on paper. I have been watching what
21 has happened to the storage issue for the courts. I've
22 watched it for health care providers for the past 20
23 years. It's astounding. Anything we do that will save
24 the courts on the incredible expenses for storing paper is
25 to be desired, and if that means lawyers have to pay five

1 or six dollars to e-file a copy and then provide hard
2 copies for the judges who want to read them, I think
3 that's a fair outcome, because essentially you're just
4 transferring the costs of storage to someone who are not
5 using the courts directly.

6 It doesn't bother me, and I might also say I
7 don't know what the Federal district courts are doing in
8 other people's venue, but our Federal judges, the Federal
9 district courts in my area, have made it crystal clear
10 that anything over 10 pages that's e-filed, they want a
11 hard copy in chambers the next day, and you will get a
12 call for their courtesy hard copy for the next day if it's
13 not there, so that's my experience. Thank you.

14 CHAIRMAN BABCOCK: Justice Jennings.

15 HONORABLE TERRY JENNINGS: This idea about
16 saving money, I know in our court we did have storage
17 problems, but I think we've got into a position now where
18 we're destroying a lot of things timely; whereas before we
19 were not; and so I think that's really helped us on our
20 storage costs. I mean, we're still getting the briefs and
21 so forth. We're just not keeping it as long as we did,
22 but we're still using it at the appropriate time of using
23 it.

24 One of my concerns is the shifting of costs
25 to the taxpayer, because if we get into a position where I

1 think litigants could say, "Look, we've given you the
2 electronic copy, why should we go through the expense of
3 printing you up the hard copy," well, that puts it upon
4 the judges and the courts to print out this stuff. You
5 know, the court reporter's record, and these can be quite
6 voluminous, and so what you're doing is you're shifting
7 the cost from the litigants to the taxpayers, and anyway.

8 And in regard to this point about Kindles,
9 it's not necessarily about the quality of the print on the
10 computer screen or the Kindle and how great that's going
11 to get. It's the idea of reading multiple things at the
12 same time to kind of really grasp the issues and
13 understand them, and unless you give me five or six
14 Kindles that I can, you know, flip back and forth page to
15 page and understand what the parties are really arguing
16 about, it ain't going to happen.

17 CHAIRMAN BABCOCK: Yeah, Judge Christopher,
18 then Alex, and then Pete.

19 HONORABLE TRACY CHRISTOPHER: Well, there's
20 just one other sort of issue with respect to the quality.
21 I have seen those really cool embedded briefs. I don't
22 know what they call them.

23 HONORABLE SARAH DUNCAN: Hyperlinked.

24 HONORABLE TRACY CHRISTOPHER: Hyperlinked
25 briefs, okay. These are great, they are wonderful, and

1 unfortunately our system does not accommodate them, so you
2 can't electronically file a hyperlinked brief, and so, you
3 know, if you want people to start reading things
4 electronically, fix that. I mean, that is the greatest
5 thing.

6 HONORABLE SARAH DUNCAN: I love my
7 hyperlinked briefs.

8 CHAIRMAN BABCOCK: Yeah, before we go on,
9 that's a really important point. Does everybody know what
10 a hyperlinked brief is?

11 MR. HAMILTON: No.

12 CHAIRMAN BABCOCK: At least Carl doesn't, so
13 could you tell us all what that is?

14 HONORABLE TRACY CHRISTOPHER: Well, I don't
15 know exactly how it's done, but you'll be reading along
16 and you'll get a case cite, and you click on the case
17 cite, and the case pops up. Or you'll be reading along,
18 and it says "Transcript, page 21," and you click on that,
19 and there is the transcript page 21 for you. Pops up, and
20 you can double check that, you know, what they said was
21 the case, and I don't know how it's done, but that's -- I
22 mean, it's really -- and I would think it would be very
23 useful at the appellate to be able to do that.

24 HONORABLE KENT SULLIVAN: Can you file one
25 in Federal court, or will Federal court accept a

1 hyperlinked brief and have it work?

2 HONORABLE NATHAN HECHT: I don't know. The
3 clerk of the Fifth Circuit has provided us examples of
4 things that have been filed with them, but I don't know if
5 that was the filing or if the lawyers just handed it to
6 them in addition. We have had hyperlinked briefs filed in
7 our court. In fact, I remember in the school finance
8 case, the last version of it, the record was all in a
9 searchable format that we placed -- the parties provided
10 it to us, told us it was the record, both parties agreed,
11 and we put it on our computer system so that anybody on
12 the legal staff could find the testimony of Jones or
13 Exhibit 3412 or anything that was in the record literally
14 within a few seconds, and then print it out if they wanted
15 to or whatever, but there wasn't any other practical way
16 in a case like that. It greatly increased the efficiency
17 of the Court's work on the case for 90 people to have
18 access to the record whenever they wanted it.

19 CHAIRMAN BABCOCK: Justice Sullivan, in the
20 instances where I've had a hyperlinked brief I've always
21 provided it as a courtesy copy on a disc to the court.
22 And I've never filed it. I don't know if anybody ever
23 has, but I don't know of any way you can. Can you, Angie?

24 MS. SENNEFF: File a hyperlinked?

25 CHAIRMAN BABCOCK: File a hyperlinked brief

1 electronically in Federal court.

2 MS. SENNEFF: I haven't. I haven't tried.

3 CHAIRMAN BABCOCK: Sorry. Alex.

4 PROFESSOR ALBRIGHT: Well, I have two things
5 I wanted to talk about. One is reading things side to
6 side. You know, just I don't think anybody should have to
7 read anything on a screen that doesn't want to. I'm just
8 trying to train myself to do it now, but that was an issue
9 to --

10 HONORABLE TERRY JENNINGS: So you're not
11 going to push me to do it?

12 PROFESSOR ALBRIGHT: No, no, no, but the
13 side by side thing was an issue for me, and so my computer
14 people -- I now have two screens.

15 HONORABLE TERRY JENNINGS: Yeah, but I have
16 three briefs and a case and a statute.

17 PROFESSOR ALBRIGHT: But, I mean, you can
18 have three. I mean, it's just a matter of your screens
19 and how many places you can --

20 HONORABLE TERRY JENNINGS: And I can carry
21 those up on the bench with me and I'll have three screens
22 that I can refer to?

23 PROFESSOR ALBRIGHT: No, but all I'm saying
24 is the technology is changing so quickly it's taking --
25 people are dealing with some of these issues. And then

1 the hyperlinks are another thing, so you can have the case
2 over here and, you know, the print over here.

3 HONORABLE TERRY JENNINGS: Almost sounds
4 like people want to sell computer equipment and make money
5 doing it.

6 PROFESSOR ALBRIGHT: Well, they may. So
7 then I also -- you know, we deal with paper. I had a
8 situation in my class just a couple of weeks ago where I
9 was teaching the jury charge, and I wanted them in groups
10 to draft a jury charge, and I gave them one with problems,
11 and I gave them a pattern jury charge, and I gave them
12 scissors and tape, and they were supposed to cut and tape
13 and get the question right. The students flipped out
14 because they had to deal with paper and scissors and tape.
15 They are so used to --

16 CHAIRMAN BABCOCK: You need to give them a
17 rock. What were you thinking about?

18 PROFESSOR ALBRIGHT: They kept saying,
19 "Well, why can't we do this on the computer?" I said,
20 "Because I want you to finish it in class now, and I want
21 you to give it to me at the end of class," and they were
22 just kind of flipped out about it, so we -- you know, we
23 are the last generation that is going to deal with paper,
24 and it makes -- I mean, and we are going to deal with
25 paper, but our systems need to start moving towards

1 accepting things electronically so when people don't want
2 to deal with paper they don't have to deal with paper.

3 The other thing I want to talk about is
4 funding. On this university committee we're -- that's the
5 huge issue, is funding, because everybody thinks that
6 computers are cheap, that electronic storage is cheap
7 because everybody talks about, you know, that you can buy
8 a gigabyte or a terabyte for almost nothing now. You can
9 add it.

10 But it's cheaper than having five floors of
11 rented paper storage, but you always have to be upgrading
12 that data server. You have to have somebody dealing with
13 the security of that server. You have to have backup on
14 that server, and perhaps because we're dealing with the
15 appellate courts and they're statewide, there's a state
16 data bank where you can have a virtual server over there
17 to -- so if yours fries you have another copy over there,
18 but it's all these things are expensive, so there has to
19 be some kind of fee attached, and for Senator Lieberman to
20 say, "I can't believe there's a fee because technology is
21 so cheap now," that's not really understanding what -- you
22 know, that there is a huge infrastructure cost for
23 technology that has to be taken into account.

24 CHAIRMAN BABCOCK: Alex, are you a mandatory
25 or a permissive person? I can't tell.

1 PROFESSOR ALBRIGHT: I'm a mandatory filing
2 electronically, that that should be the official record.
3 I have no problem with courts saying, you know, by local
4 rule you have to -- you know, we're not going to pay for
5 the printing. You have to pay for the printing for us,
6 but that can be changed so as a new generation of judges
7 comes, they say, you know, "Why are we making these people
8 print?"

9 CHAIRMAN BABCOCK: Was anybody else in queue
10 before Judge Benton? Pete was. Sorry. Then you, Levi.

11 MR. SCHENKKAN: I want to start by saying --
12 I apologize, Judge. I'm not a Luddite. A Luddite is
13 someone who is against this whole idea and is out there
14 smashing the -- whatever they will.

15 CHAIRMAN BABCOCK: That was Justice Jennings
16 to a tee.

17 MR. SCHENKKAN: That's not my position. My
18 position is I'm -- you know, the faster I run on this the
19 behinder I get. You know, I just can't keep up with it,
20 but I want to start after that by saying I do perceive
21 from those who are better -- who are running faster than I
22 am or started closer to up with it, that there are great
23 benefits to it, that they can go in and use the hyperlink
24 system effectively, and then once they've hyperlinked to
25 that case that the lawyer gave them for that proposition,

1 they can switch over electronically to their internet
2 legal research and check to see if that's actually the
3 case you need, or if, in fact, it's been called into doubt
4 by -- you know, they know how to do that, and they
5 apparently also know how to move quickly to cut and paste
6 sections electronically out of somebody's brief into their
7 draft opinion and then work from that, and that I assume
8 is your student's answer to the question of why do they
9 need to do these scissors. They say if you let us use our
10 computers in your classroom we'll hit the print button in
11 45 minutes on our draft, and you'll be able to read it
12 better than the cut and paste version.

13 PROFESSOR ALBRIGHT: Right.

14 MR. SCHENKKAN: So I'm fully on board with
15 the proposition that there are great benefits to having
16 the electronic system in place as well, and we ought to
17 push ourselves and push everybody to have it available,
18 and I think we are really down to the question of what are
19 the extra costs for the participants, whether they are the
20 lawyers out in El Paso or someplace that's farther away
21 from a Kinko's than El Paso, and they don't have a
22 300-dollar printer that can scan in the summary judgment
23 evidence. What are the extra costs to the lawyers, and
24 what are the extra costs to the courts, and then we have
25 to come up with a way of fairly and adequately funding

1 those extra costs, and I'd sort of like to know
2 pragmatically what are we talking about.

3 I have no -- the 300-dollar number for the
4 printer scanner is the first concrete number I've heard
5 today for any part of the system. What is the extra cost
6 for Justice Jennings' court of a system in which all the
7 briefs are going to be filed electronically, with the
8 summary judgment evidence and the Rule 11 agreements and
9 whatever are the other pieces of paper that have to be
10 attached or filed in some way that have been scanned in
11 and are not searchable, less searchable, I'm not even
12 clear on that, and his court is going to exercise the
13 option and you're going to have to file 11 paper copies
14 because -- or whatever the number is.

15 HONORABLE TERRY JENNINGS: Yeah, I don't
16 know what number you put on it, but I can tell you this.
17 I use books. You know, West sends me a book, and I use
18 them, and I mark them, and I can go back and find City of
19 Keller or whatever.

20 MR. SCHENKKAN: Please tell me you didn't
21 pick that one because of opinion case.

22 HONORABLE TERRY JENNINGS: No, because it's
23 cited often, and sometimes you have to look it over to
24 make sure you understand it. But I can tell you this.
25 Every time I go out to the printer -- I share a printer

1 with several lawyers and judges. Every time I go out
2 there there's a stack of paperwork. People are printing
3 off the same case over and over again, and you know, this
4 idea that we're saving trees with computers is absolutely
5 absurd, because people are printing cases off more and
6 more when all they really need to do is go to the
7 bookshelf and pull that case, and they can use that same
8 copy over and over again.

9 So I know that our printing costs have
10 probably -- I can't put a number on it, but just by using
11 Westlaw and people getting into this habit of I can find
12 it on Westlaw quickly, but I'll be damned if I can
13 comprehend it on the computer screen. So what do they do,
14 they hit "print," and every time I go out there everyday,
15 there's a stack of paper of cases that are being printed
16 over and over again. So this idea that we're saving trees
17 and we're saving money, I'm not going to buy it.

18 I'm not against computer technology. I use
19 it. I love word processing and all that. What I'm
20 against is this idea that somehow that all because it's on
21 a computer screen, oh, I'm magically going to understand
22 it better. No. You still have to do the hard work of
23 actually reading the briefs and digesting them, and I'll
24 tell this to Judge (sic) Dorsaneo. If you appear on a
25 panel in front of Judge Bland and I, you will know that we

1 read your briefs.

2 HONORABLE JANE BLAND: Well, you used to
3 know that.

4 PROFESSOR DORSANEO: Good.

5 HONORABLE JANE BLAND: I'm kidding. I'm
6 kidding.

7 CHAIRMAN BABCOCK: Yeah, let the record
8 reflect that all this stuff about reading or not Professor
9 Dorsaneo's brief was in jest. Sarah.

10 HONORABLE SARAH DUNCAN: One of the
11 advantages of an electronic system is accessibility.
12 Before I left the Fourth Court of Appeals we were actually
13 going to use unappropriated funds to get an electronic
14 system so that we could internally make all records, all
15 briefs, available to everyone in the court, and I don't
16 know where the court has gone with that. The system that
17 they have in Harris County we did not see as adequate
18 because it needs to be linked with case management, but as
19 far as the cost is concerned, Pete, to me there is a
20 cost -- there are different ways to look at costs and
21 funding, and I think we should all be very realistic. The
22 Legislature is not going to authorize secretaries for all
23 of the appellate court judges and staff, and that's what
24 would be required if we're going to shift the printing to
25 the court system.

1 So in my way of always wanting exactly what
2 I want, I want it both ways. I, too -- I mean, I use
3 paper, too, and I print a great deal, and I love my big
4 blue single string recycling cart, but we can't shift to
5 the appellate system the printing function. We can't do
6 it, because we can't make the Legislature fund the
7 appellate court system printing and binding and all of
8 that. So to me the only way this is going to work is if
9 we for some period of time in the future have a dual
10 system that you still get your paper brief, you still get
11 your paper record, but you also get it electronically
12 because the electronic, the cost to -- once it's in paper
13 format, the cost to put it in electronic format is really
14 not much. That's my vote. I think it should be mandatory
15 with exceptions, but I think we should continue the system
16 we've got until nobody at this table wants it, and I
17 frankly don't think that day is going to come.

18 CHAIRMAN BABCOCK: Hatchell, you're an
19 appellate wise man. What do you think about all of this?

20 HONORABLE SARAH DUNCAN: He uses books.

21 MR. HATCHELL: Yeah, for the last 30 years
22 the same set of Reporters has been within 18 inches of me
23 everyday.

24 CHAIRMAN BABCOCK: But it's growing, though,
25 over 30 years.

1 MR. HATCHELL: On the other hand, I do spend
2 almost all day at a computer. I guess Terry's comments
3 really resonate with me on one hand. On the other hand, I
4 think it is good to have a uniform set of rules and
5 everybody complies with, and I think some day, how long
6 that will be, we will be totally paperless, so the
7 question is how do we get there. I think it's a shame in
8 a lot of ways that that's the way it will be.

9 Terry, for example, I will edit a brief on
10 the screen and then I will print it out, and it makes a
11 completely different impression on me, and I will edit it
12 completely differently by hand, because it just reads
13 differently to me.

14 The same is true of a record. If you look
15 at one page of a 45-page contract, focus on this, it's
16 completely out of context with the entire integrated
17 document, but I'm afraid that's where we're going, and
18 it's an unfortunate thing, and it's not to demean the way
19 judges are judging cases, I just think it's unfortunate
20 that we're all being channeled to a computer screen, but
21 where I come down is, is that we're going to be paperless
22 someday, and I think it's good to have mandatory rules.
23 The question is how quick do we get there. I don't think
24 we're quite ready to just go cold turkey on that, so I
25 would like to see us ease into it.

1 CHAIRMAN BABCOCK: Well, it's interesting
2 because we have what you just said, I mean, is completely
3 mirrored by the fact that the Texas Supreme Court has one
4 view and the Texas Court of Criminal Appeals has another
5 view. So Carl, then Judge Benton, then Justice Gray.

6 MR. HAMILTON: Do the appellate courts now
7 have electronic scanners so that they can convert a filed
8 paper into electronic form if they want to?

9 HONORABLE SARAH DUNCAN: I don't think
10 anybody here can speak for all of the appellate courts,
11 can they? Can you guys?

12 MS. PETERSON: Bruce, I think there was some
13 money, though, right, that's been identified appropriated
14 for technology, and maybe you could speak to what that is.

15 MR. HERMES: As part of the project funding
16 we are purchasing high volume, high speed scanners for the
17 appellate courts, so that will be in -- those will be in
18 the courts as part of the scope of the project.

19 HONORABLE SARAH DUNCAN: But who's -- is
20 there funding for personnel to run those high speed
21 scanners?

22 MR. HERMES: Well, the scanners do the
23 scanning.

24 HONORABLE SARAH DUNCAN: Staffs have been
25 cut, as you know.

1 MR. HERMES: The scanners do the scanning.
2 People set documents on top of it.

3 HONORABLE SARAH DUNCAN: I understand that,
4 but somebody -- a person has to run that scanner.

5 MR. HERMES: Yeah, they have to push the
6 button and start the scanning. So at most what they need
7 to do is they're going to key into the case management
8 system their information about that filing that just
9 arrived. That's routine to paper process anyway, and they
10 may have to unbind it if it's bound and then they would
11 set it on the scanner and let it scan.

12 HONORABLE SARAH DUNCAN: Well, every brief
13 just about that comes in is bound, every reporter's record
14 is bound, and every clerk's record is bound.

15 MR. HERMES: Right.

16 HONORABLE SARAH DUNCAN: When the Fourth
17 Court was looking at doing this we were looking at hiring
18 one more person, because our people -- our staff had
19 already been cut by the Legislature, our funds, and we
20 were looking at adding another deputy clerk just to handle
21 going to a digital format, which we were -- we were
22 willing to pay, but I don't think we can kid ourselves
23 that just because the Legislature appropriates funds for
24 hardware, that translates into the people time that this
25 system is going to take.

1 MS. PETERSON: Do you think it's possible
2 that some people time may be saved, though, because right
3 now there is some time, personnel time, being spent on
4 taking in all of this paper, stamping it, distributing it,
5 so I think there will be some savings as a result of
6 e-filing.

7 HONORABLE SARAH DUNCAN: When we get to the
8 point that all we have is e-filing, I'm sure that's true.
9 For any court of appeals, our docket was 50/50 civil and
10 criminal. What incremental amount was saved by the
11 e-filing that was done wasn't going to begin to create
12 that -- I can't remember how many right now -- 15th person
13 in the front office to handle that. And we didn't have
14 secretaries, either, so it's not -- it's not like we were
15 going to be creating a secretary to do my printing for me.
16 We were creating another person in the front office to run
17 the scanner.

18 CHAIRMAN BABCOCK: Justice Gray, and then
19 Rusty, and then Pete, and then Carl, and then Justice
20 Bland.

21 HONORABLE TOM GRAY: I thought there was
22 somebody else down here before me. I'm writing some
23 notes.

24 CHAIRMAN BABCOCK: Levi yielded to you. So
25 you yield to Rusty?

1 HONORABLE TOM GRAY: I yield to Rusty,
2 always.

3 MR. HARDIN: I'm curious as to what's
4 driving this idea of making it mandatory other than
5 storage space. I don't hear anything in the debate to
6 suggest that it will improve the quality of judging and
7 decisions and advocacy; and so if, in fact, we polled the
8 lawyers in the state of Texas, I would dare to say that
9 most would be resistant to the idea of it being mandatory;
10 and it sounds to me like I bet you if we polled all the
11 appellate judges, it would be odd to them that if it was
12 mandatory and if they're going to have a written brief
13 it's got to be provided by them printing it out.

14 I listen to Justice Jennings, and I listen
15 to you, and I think why should we bemoan the disappearance
16 of something that so many of us really don't want, unless
17 we're going to kill off our whole generation, and so I
18 totally agree that if you start talking to -- the lawyers
19 in my office are 36 to 43. Every one of them would work
20 off of the computer completely all the time. No question
21 about that. And that maybe one day we get there, but why
22 speed it up?

23 Why make a mandatory system that seems to
24 have its only big attribute would be storage space, and
25 storage space we can take care of by having electronic

1 filing, but certainly why not have the lawyers continue to
2 provide written briefs along with it. I don't quite -- if
3 you have a written brief and it's there electronically
4 when the case is over, you can put that written brief in
5 file 13, can't you? You can store it by just getting rid
6 of it and having it shredded because you've got a record,
7 it's there. You don't need it anymore.

8 HONORABLE TERRY JENNINGS: They're destroyed
9 unless a petition for review is filed, and you save it.

10 MR. HARDIN: I didn't even know what a
11 Luddite was until today, so I can't say that I am. I can
12 just say I don't understand why we have to race to make
13 this mandatory.

14 CHAIRMAN BABCOCK: Pete, unless you want to
15 yield to Sarah, who wants to rebut what Rusty just said.

16 MR. SCHENKKAN: I apologize for not
17 yielding, but I really was wondering if -- I meant it as a
18 question. Maybe it didn't come across as a question.
19 Kennon, do we have some actual information about what the
20 incremental cost to a six justice court of appeals of
21 having to print out the briefs when they want to print
22 them out if they're not given them in hard copy to start
23 with because we're doing electronic filing? I mean, I
24 don't have a feel for what the incremental cost is. What
25 Sarah just said about adding a single person is the first

1 thing I've heard that goes to that issue.

2 HONORABLE SARAH DUNCAN: No, that wasn't
3 even to print off the briefs. That was to scan paper and
4 get it into a digital format for storage.

5 MR. SCHENKKAN: I know it's not the same
6 thing, but it's the first thing I've heard that kind of
7 bore on the issue.

8 MS. PETERSON: And Bruce would know more
9 than me about this, because the financial side of it has
10 been addressed --

11 MR. SCHENKKAN: Then let me redirect to
12 Bruce.

13 MS. PETERSON: -- at the OCA level.

14 MR. HERMES: If I may, the appellate
15 e-filing has been done in some other states, most notably
16 Colorado, and Missouri is using it as well, and what they
17 have found is that there was a spike in paper costs after
18 the initial implementation, and after that it plummeted as
19 the folks became used to working that way, and what they
20 are doing in those other states is they are pressing the
21 technology to make the electronic reading experience enjoy
22 as many of the advantages of the paper reading experience
23 as possible, with margin notes, tabs sticking out of
24 pages, large screens where you can arrange multiple
25 documents at the same time, but anyway, to answer that

1 question concisely, there was a spike and then a drop off.

2 MR. SCHENKKAN: And the spike is kind of
3 what order of magnitude and lasted how long?

4 MR. HERMES: I don't know the particulars.
5 I understand it's significant.

6 MR. SCHENKKAN: Then that's my notion, is if
7 we can get our arms around what the spike is, how big it
8 is and how long, and we say this is a transition cost to
9 everybody, and for now we've got this fee that is a
10 temporary transition cost, but we get used to it, and if
11 it materializes that it drops back down we're going to
12 stop charging it, but we aren't going to make the already
13 strapped Fourth Court of Appeals, you know, that is having
14 to fight with Bexar County as to whether they're going to
15 be kicked out of a building take money away from whatever
16 else they're already doing to do this for -- if it turns
17 out to be two years or five years. I don't know what a
18 spike is.

19 MS. PETERSON: Bruce, in the appropriated
20 funds, has it all been for equipment? Has any of it been
21 for personnel?

22 MR. HERMES: It's for software development
23 and equipment, and that's the scope of it.

24 CHAIRMAN BABCOCK: I'm losing track of my
25 order, but I know Carl was next, and then maybe Justice

1 Bland.

2 MR. HAMILTON: We e-file almost everything
3 in the state court, and it's an easy simple process; and I
4 think more and more people are using that; and I think if
5 we make it available in the appellate court, time will
6 take care of itself as to who is going to use mostly that
7 and who is going to want to file paper; but I think the
8 option ought to be there if you want to file paper, you
9 ought to be able to file paper. If you want to file
10 e-mail, file e-file, but eventually everybody may go to
11 e-filing, but those that maybe don't have it or don't want
12 to ought to be able to still send the paper up there, and
13 if the appellate courts want to use the paper, they're
14 going to have the scanners that they could turn it into
15 paper.

16 CHAIRMAN BABCOCK: But you're going to shift
17 the cost. Justice Bland.

18 HONORABLE JANE BLAND: Well, I've been
19 persuaded by the arguments that Kennon's solution of
20 having the local rule determine the number of copies might
21 be good because it might build in the flexibility to get
22 rid of paper copies altogether when we get to the point
23 that may come one day that nobody uses them.

24 My question is, Kennon, you said, you know,
25 we'll have a lot of time saved in the clerk's office

1 because we won't have to file stamp and distribute paper
2 copies anymore, but I'm wondering is the electronic filing
3 from TexasOnline into our case management system, is that
4 a seamless transition or does when something get e-filed
5 with TexasOnline does it require task spy court clerks to
6 get it into our system? And if so, then we've got the
7 same issue. It's just doing it with the computer instead
8 of doing it manually, physically.

9 Because I'll say that we electronically
10 circulate a number of our draft opinions now, and I know
11 there was some time involved in copying those and
12 distributing them into boxes, but now that -- it takes --
13 the software -- at least the software we have right now,
14 and I envision that it would be much faster with this
15 statewide project, but it takes a long time for the
16 software to come up. I have to open it. I have to record
17 my vote, and it takes a lot of time, and then if I have to
18 print it then I have to print it. So I don't really think
19 that there's been, you know, huge amounts of time savings.
20 I also say, you see that big spike in people printing
21 things out. Then they get tired of printing things out,
22 but that doesn't necessarily mean they're reading them on
23 the screen now. It may be that --

24 HONORABLE TERRY JENNINGS: You get worn out.

25 HONORABLE JANE BLAND: -- they're reading

1 less material, because in our two court -- well, in our
2 court, it's just in our court, there's this idea of full
3 court circulation where a panel sends around a draft
4 opinion to the entire court for three days, and if anybody
5 wants to hold it or give a comment, they can, and we're
6 now doing that electronically, and I -- and it's -- the
7 number of people giving comments or holding things has
8 just plummeted because it takes so long to pull up an
9 opinion, read it on full court. If you have comments, you
10 can electronically send them or you can print it out and,
11 you know, I think Judge Taft is -- you know, every night I
12 see him at the printer. He prints out every single one of
13 those full courts and reads every single one of them, but
14 so I'm not sure the spike -- the spike in paper that
15 happens eventually and then it declines because people are
16 reading off the computer, I'm not sure that's a fair
17 inference. It may be just that they're reading less.

18 HONORABLE TERRY JENNINGS: The lowest common
19 denominator prevails eventually.

20 CHAIRMAN BABCOCK: Sarah, then Alex.

21 HONORABLE SARAH DUNCAN: I completely agree,
22 and it concerns me, but I do want to respond to why the
23 push. I actually do think it will help judges and the
24 court staff to produce a better product. The one case I
25 remember I had that was -- it was a long wrongful death

1 case, Trammell Crow, and I had the record on a CD, clerk
2 and reporter. It was all hyperlinked. I had all the
3 cases. The record, you know, we've got one now that the
4 record is, what, 40 something volumes?

5 MR. HATCHELL: 65.

6 HONORABLE SARAH DUNCAN: And I don't have
7 room in my office for all of that record. I didn't have
8 room at the court. The chances of me reading more of that
9 record are higher if I can do it on the screen because I
10 can't physically accommodate it in my office.

11 HONORABLE JANE BLAND: Well, that's true.
12 It's great for the record. It's great for electronic
13 research. It is great.

14 HONORABLE SARAH DUNCAN: Well, all I'm
15 saying is it's great in some instances. In other
16 instances it would be horrible. It would I think cause
17 less reading by fewer people, but that to me is why we
18 want to keep both systems. I frankly don't think we're
19 ever going to get to a point in our society, at least I am
20 not visionary enough to see it, where we don't use paper.
21 I think we're going to do a better job of recycling and
22 shredding and all those kinds of things.

23 You know, I had two screens at the court,
24 and it was wonderful because I could keep e-mail up on one
25 or Westlaw and the opinion I was writing over here. It

1 was great, but I couldn't have looked at more than two,
2 and I do look at more than two things when I'm writing a
3 brief or an opinion. It's the reason I have a three-sided
4 desk, both at home and at the office. I have clerk's
5 record here, reporter's record here, and opinion here, so
6 I think we've got to accommodate both. I don't think it's
7 just being a dinosaur. I think it's doing -- it's hard
8 work. It's real hard work, and however you can get it
9 done, that's great, but I really do think it will increase
10 the efficiency and permit the courts to continue offering
11 the level of service that's needed, and I think it will
12 increase the quality.

13 I mean, just, you know, when I got to the
14 Fourth Court, the courts used to have this system called
15 ISIS, and that was how the unpublished opinions were
16 indexed, and then somebody decided -- a state agency that
17 will go unnamed, or a division thereof -- we don't need
18 ISIS anymore. Well, the Fourth Court had no idea what it
19 had ever said. We, we, started submitting our unpublished
20 opinions to West for inclusion in Westlaw so that we could
21 find out what we had said in our unpublished opinions, and
22 I don't think that's unusual. So the ability to search
23 electronically is worth -- you know, to sit there at my
24 computer and to be able to type, you know, "dinosaur" in a
25 42 volume, six-month trial and find every instance of

1 "dinosaur" in that record and then go look at them, it is
2 a marvelous thing, and it really does make for better --

3 CHAIRMAN BABCOCK: And "Jennings" came up
4 about 10 times on that search. Justice Bland.

5 HONORABLE JANE BLAND: I was just -- Kennon,
6 could you answer my question about what responsibilities a
7 clerk has at the point after a lawyer files,
8 electronically files with TexasOnline, then what is the
9 next step in the process electronically and what kind of
10 human touch does there have to be to anything, or is it
11 sort of a seamless transition?

12 MS. PETERSON: I can speak to part of that,
13 and I may need supplementation. My understanding is that
14 the clerk will get something from TexasOnline, the filing,
15 and the clerk then has to review it and either accept or
16 reject the filing. So it's on the screen, but it's like
17 what they would be doing at the desk normally to have to
18 review and then make a decision to affirmatively accept or
19 reject.

20 HONORABLE JANE BLAND: But there's no
21 imaging or scanning that they have to do. It's
22 automatically then in the -- it automatically --

23 MS. PETERSON: Yes.

24 HONORABLE JANE BLAND: -- becomes part of
25 our case management software?

1 MS. PETERSON: Yes.

2 MR. HERMES: That's correct. The way the
3 parties classify a document may need to be reviewed and
4 revised to be accepted into the case management system,
5 but little more than that.

6 CHAIRMAN BABCOCK: Alex, you had your hand
7 up a minute ago.

8 PROFESSOR ALBRIGHT: Well, I guess when
9 you-all were asking about how much it costs to print. At
10 the University of Texas they have to pass that on to
11 students, and it's 12 cents a page, so, I mean, that's to
12 buy the printer, buy the laser cartridge, the server, the
13 -- you know, and then the people to fix it, it averages
14 out to 12 cents a page.

15 CHAIRMAN BABCOCK: Judge Lawrence.

16 PROFESSOR ALBRIGHT: It's expensive. I
17 mean, I see this completely as a who's going to pay for
18 the printing, and when we all acknowledge that the
19 people -- the decision-makers now want pieces of paper and
20 the state can't afford it, we should have electronic
21 filing and local rules that say you still have to provide
22 the paper, which can be changed over time as the world
23 changes. You know, already it's not going to be long
24 before if you want it your desktop can be like a big iPod
25 touch with pieces of paper on it that you're moving

1 around.

2 CHAIRMAN BABCOCK: Yeah, look at CNN.

3 PROFESSOR ALBRIGHT: Yeah. Yeah. So we
4 can't anticipate what the world is going to be like in
5 technology, and all we can do is deal with what we have
6 now and try to be as flexible as we can for the future. I
7 think we all acknowledge -- at least I hope everybody
8 acknowledges that for permanent records, the way people
9 live now is to have them in data storage and not in paper
10 and file drawers, and if you can make people provide it,
11 if they already have it electronically and you can make
12 them give it to you so you can put it into your data
13 storage without you having to pay for somebody to do the
14 scanning to get it done is the way to do it because they
15 already have it in electronic form, and so what we're
16 doing now is we're -- we have an electronic form that's
17 being printed and then people are scanning it to get it
18 into worse electronic form and in bigger file sizes that
19 are then going into data.

20 CHAIRMAN BABCOCK: Judge Lawrence.

21 HONORABLE TOM LAWRENCE: I think Justice
22 Bland has hit on a problem. It may be more critical in
23 the trial courts than appellate courts, but in the trial
24 courts you have a case management system typically if
25 you're computerized, and you enter things in the system

1 like plaintiff's name and attorneys' names and addresses
2 and various things, and then when you print out your
3 documents, your docket notices, your writs, your
4 judgments, everything you print out you take the
5 information from the fields in your case management
6 system.

7 If there's not a seamless transition between
8 the e-filed document and the case management system then
9 your clerk has to sit there and print out the e-filed
10 document and then type into your case management system
11 all the information in that document, so you're not saving
12 anything. The critical step to make e-filing worthwhile,
13 at least for a trial court, is that there has to be the
14 software transition that allows the document filed to go
15 into the fields in the case management system so it's
16 useful to the clerks. Otherwise, you're actually adding
17 to the cost and the expense, because the clerk has to
18 print out the e-filed document to be able to type that
19 stuff into the case management fields.

20 MS. PETERSON: And Bruce can speak to how
21 TAMES is designed to address some of these concerns.

22 MR. HERMES: Correct. The filer when
23 they're e-filing, the party or the attorney doing the
24 e-filing does enter information about the parties, the
25 representation, the style, the cause number, all of that,

1 and that is available through the technology to suck right
2 into the court's case management system, so that is
3 available to those courts that are technologically able to
4 suck in that so called XML data.

5 HONORABLE JANE BLAND: Who's technologically
6 able to do that? Is our court, for example, able to do
7 that?

8 MR. HERMES: Your court will be, yes.

9 HONORABLE TOM LAWRENCE: But this is not
10 applicable to the trial courts, though. The county and
11 district and JP courts, we're not able to do that, though,
12 now, are we?

13 MR. HERMES: Well, that's a function of the
14 various software programs that are bought by the local
15 jurisdictions. Here in Travis County they're very much
16 able to do that, and then it's going to vary elsewhere as
17 well.

18 And one other note. When documents are
19 available on the computer screen for classification
20 basically what that -- the word is metadata, data about
21 data, the description of a particular document. That
22 document can appear on the screen while it -- while the
23 metadata is being collected in another window. It does
24 not need to -- even in that case it doesn't need to be
25 reprinted to be transcribed back into the computer again.

1 But the bottom line is the data that's
2 coming in from TexasOnline e-filing entered by the party
3 about the case or the filing is available and at least in
4 the appellate courts will be sucked right into the case
5 management system.

6 HONORABLE JANE BLAND: How about all the
7 other codes, like to say what the document is? Are those
8 available for the lawyers so that they can put in a
9 description, like this is an appellate brief, this is a
10 motion for extension?

11 MR. HERMES: Uh-huh.

12 CHAIRMAN BABCOCK: Okay. Yeah, Sarah.

13 HONORABLE SARAH DUNCAN: So this will be
14 fully compatible with case management?

15 MR. HERMES: Yes.

16 HONORABLE SARAH DUNCAN: So if I'm sitting
17 at a desk in New York and I go through my virtual private
18 network and pull up the court's server, I can access all
19 the briefs, the record, everything.

20 MR. HERMES: Yes. If you got on a plane to
21 New York naked, you could arrive in New York and pull up
22 everything about that case.

23 HONORABLE SARAH DUNCAN: Okay. That's
24 why -- my understanding is that you couldn't do that with
25 the Houston court's system, which is why the Fourth

1 Court -- you-all are doing it the way I think it ought to
2 be done, and I think we ought to do it now.

3 CHAIRMAN BABCOCK: The record should reflect
4 that when you meant naked, you meant naked without any
5 documents.

6 MR. HERMES: As you say.

7 MS. PETERSON: He's speaking tech.

8 CHAIRMAN BABCOCK: Just to make sure I know
9 I'm listening.

10 MR. HERMES: That was to get through
11 security more quickly.

12 CHAIRMAN BABCOCK: A computer strip search.
13 So that's a good segue into how mandatory, how fast.
14 Sarah, you say mandatory and fast. Anybody else got any
15 other comments on that?

16 HONORABLE SARAH DUNCAN: Well, mandatory,
17 but I also think we ought to continue paper filing.

18 CHAIRMAN BABCOCK: Yeah, mandatory with a
19 paper twist. Fast. Rusty.

20 MR. HARDIN: I can't think of any objection.
21 What would be the objection to that? I think that means
22 that those who want to continue to be able to use paper
23 will be able to do it, but we're moving to a process that
24 ultimately is going to be almost exclusive in the future
25 probably when people want to do that. What would be the

1 argument against doing it mandatory and still being able
2 to do paper?

3 HONORABLE SARAH DUNCAN: It adds another
4 layer of cost onto the appellate system. But, frankly,
5 given what the Legislature has done with fees, what's
6 another layer?

7 MR. HARDIN: Additional cost would be what?

8 HONORABLE SARAH DUNCAN: To have it -- my
9 understanding is that virtually every court reporter in
10 the state -- that might be an overstatement -- has the
11 ability to produce a digital -- a record in a digital
12 format. My understanding is that not all of the county
13 and district clerks can do that with the clerk's record,
14 with the pleadings.

15 MR. HARDIN: So it would be initial cost of
16 the counties, but would it not be cheaper for them in the
17 long run?

18 MR. GILSTRAP: Are they providing paper,
19 too? I mean, is the county going to still provide a paper
20 reporter's record and a clerk's record?

21 HONORABLE SARAH DUNCAN: Right. What I
22 think -- and you guys know this far better than I -- once
23 I have produced something in paper, generally if we're
24 talking about the county or the court system, it's not
25 much to put it into a digital format.

1 MR. HERMES: If I may, yes, indeed, there
2 are costs associated with doing a paper filing, and then
3 to additionally provide an electronic filing there are
4 additional costs associated with those. As you know,
5 Texas went into e-filing with privatizing so that the
6 vendor, whom Mike represents, made the investment and then
7 recoups it through the user fees, so, yes, there is that
8 additional cost.

9 HONORABLE SARAH DUNCAN: But it would be the
10 convenience fee that would be the --

11 MR. HERMES: Uh-huh. Which some courts use
12 to pay for a certain amount of additional printing.

13 HONORABLE SARAH DUNCAN: Who would pay the
14 convenience fee for the e-filing of the record?

15 MR. HERMES: Well, the e-filing of the
16 record is -- we recognized that the trial courts were in a
17 special situation, as are the court reporters, and those
18 would go under this project a separate portal directly
19 into the appellate court without going through private
20 hands.

21 CHAIRMAN BABCOCK: Alex, you had your hand
22 up.

23 PROFESSOR ALBRIGHT: Well, I guess when we
24 were talking about mandatory, I guess my question was
25 mandatory, you-all said mandatory with some paper. Are

1 you saying that I'm a lawyer at Thompson Knight in Dallas,
2 and I can very easily e-file, but I just decide I want to
3 file with paper, I still have the option to file with
4 paper, or if I am a prisoner with a typewriter I can
5 petition to get --

6 CHAIRMAN BABCOCK: My understanding of
7 mandatory is that -- with pro se exceptions, pro se
8 litigant exceptions, but mandatory for lawyers would be
9 you've got to e-file. Now, by local rule, a court --

10 PROFESSOR ALBRIGHT: Can ask for paper.

11 CHAIRMAN BABCOCK: -- like the Fourteenth or
12 the First may say, you know, "We've got some paper people
13 here and so you're also going to have to file six copies
14 of briefs," but it's not --

15 PROFESSOR ALBRIGHT: So it's mandatory that
16 the record of your brief is the electronically filed
17 version. You may be required to provide courtesy copies
18 by local rule. You can -- if you do not have access or
19 you're pro se, you can petition to not do an e-filing, and
20 then the record e-filing then is a different issue
21 depending on the trial court that you're dealing with.

22 MR. HARDIN: I don't think that's what she's
23 saying.

24 HONORABLE SARAH DUNCAN: Yeah, that's not
25 what I'm saying.

1 CHAIRMAN BABCOCK: Yeah. What are you
2 saying?

3 HONORABLE SARAH DUNCAN: I think people
4 should have to continue to file paper records and paper
5 briefs, but I would make mandatory with exceptions an
6 e-filing of the same things.

7 CHAIRMAN BABCOCK: Yeah, so you're -- in the
8 question that Justice Hecht posed you would be on the
9 permissive side, that is the lawyer has a choice. No?

10 MR. HARDIN: No.

11 HONORABLE SARAH DUNCAN: Mandatory
12 electronic filing of briefs and records --

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE SARAH DUNCAN: -- with exceptions
15 for pro ses.

16 MR. GILSTRAP: And mandatory paper filing.
17 You're saying and mandatory paper filing, too.

18 HONORABLE SARAH DUNCAN: And a paper filing
19 of both, record and the briefs.

20 PROFESSOR ALBRIGHT: Mandatory, instead of
21 by local rule?

22 HONORABLE SARAH DUNCAN: I do not think it
23 ought to be by local rule.

24 CHAIRMAN BABCOCK: Okay. I'm sorry. I
25 missed what you're saying. So you say it ought to be

1 mandatory for both.

2 HONORABLE SARAH DUNCAN: Yeah.

3 PROFESSOR ALBRIGHT: What is the record that
4 this county has to maintain between those two? If I have
5 to file a paper brief and electronic brief, what is the
6 record that the court has to maintain for the retention
7 time? What's the official --

8 HONORABLE SARAH DUNCAN: I would say the
9 electronic. That's the only way to get rid of the storage
10 costs.

11 PROFESSOR ALBRIGHT: So you're still saying
12 -- but you're saying so a mandatory courtesy copy.

13 HONORABLE SARAH DUNCAN: I don't want to
14 shift the cost of printing to the court system. I don't
15 think it can afford it.

16 PROFESSOR ALBRIGHT: Doesn't your rule do
17 that? Because everybody has to file at least one, because
18 there is this unbound copy and the bound copy.

19 MS. PETERSON: And that's the editing error
20 I was referring to earlier because what you see there is
21 -- that's for paper filing, is the heading, and again,
22 that's Rule 9.3(a)(1), and so the idea would be to build
23 back in a provision for electronic filing to specify
24 whether you have to file a hard copy when you
25 electronically file a document. So I apologize for the

1 lack of clarity.

2 CHAIRMAN BABCOCK: Harvey, and then Justice
3 Jennings.

4 HONORABLE HARVEY BROWN: I just want to get
5 back to costs. If we did both obviously it's an increase
6 of costs. There's no cost savings to the client or to the
7 lawyer. If we do it where --

8 MR. GILSTRAP: You're saving on storage.
9 There's savings on storage, because they can destroy the
10 paper copy after a while.

11 HONORABLE HARVEY BROWN: Yeah, that's the
12 courts.

13 HONORABLE SARAH DUNCAN: The same is true
14 for lawyers.

15 HONORABLE HARVEY BROWN: To the lawyers and
16 clients it's going to be an increased cost for sure.

17 HONORABLE SARAH DUNCAN: But they will save
18 money on storage.

19 HONORABLE HARVEY BROWN: The lawyers?

20 HONORABLE SARAH DUNCAN: Uh-huh.

21 HONORABLE HARVEY BROWN: Why would the
22 lawyers --

23 HONORABLE SARAH DUNCAN: Because they can
24 have it all in digital format.

25 HONORABLE HARVEY BROWN: Okay. Okay. The

1 convenience fee then, seems to me, for the most part for
2 the lawyers is going away because the lawyers who want it
3 are already digitally saving it within their own file, so
4 I would think the convenience fee would be something that
5 would be dropped or dramatically decreased if you were
6 going to require both.

7 PROFESSOR ALBRIGHT: No, because you still
8 have to maintain those servers at the courts, and I guess
9 is the state going to pay for those servers at the courts?

10 HONORABLE HARVEY BROWN: Then it's not a
11 convenience fee certainly. Maybe you want to relabel it,
12 but it's not a convenience for the lawyers.

13 PROFESSOR ALBRIGHT: Filing fee. It's a
14 filing fee.

15 CHAIRMAN BABCOCK: Yeah, Justice Jennings.

16 HONORABLE TERRY JENNINGS: Yeah, when y'all
17 say mandatory, you're saying you want to turn this entire
18 map green.

19 CHAIRMAN BABCOCK: For the court of appeals.
20 At the appellate level.

21 HONORABLE TERRY JENNINGS: At the appellate
22 level.

23 CHAIRMAN BABCOCK: It's the greening of
24 Texas.

25 HONORABLE TERRY JENNINGS: Okay.

1 CHAIRMAN BABCOCK: Just for curiosity, how
2 many people here agree with Sarah that it ought to be
3 mandatory, but mandatory means both electronic filing and
4 paper filing? And how many people think that that's a bad
5 idea?

6 MR. WALLACE: Bad?

7 PROFESSOR ALBRIGHT: Meaning that it should
8 be just --

9 MR. WALLACE: Just by local rule.

10 PROFESSOR ALBRIGHT: -- electronic plus a
11 rule.

12 CHAIRMAN BABCOCK: Some other system.

13 MR. WALLACE: Oh, okay.

14 CHAIRMAN BABCOCK: Hang on. Okay. So 11
15 people think Sarah's idea of being mandatory, mandatory
16 meaning both electronic filing and paper filing, 11 people
17 think that's a good idea and 13 people think it's not.

18 MR. DUGGINS: But skip -- Chip, excuse me.
19 Check now to see how many people of the last group
20 believe --

21 CHAIRMAN BABCOCK: What?

22 MR. DUGGINS: Why don't you check now with
23 that last group and see how many of them are opposed to
24 mandatory filing period?

25 CHAIRMAN BABCOCK: Electronic filing.

1 MR. HARDIN: Yeah, because there may be a
2 break down in that group.

3 CHAIRMAN BABCOCK: No, I'm sure there is.

4 HONORABLE TOM LAWRENCE: The question is not
5 opposed. It's whether or not it's permissive to begin
6 with.

7 MR. HARDIN: Right.

8 CHAIRMAN BABCOCK: Right, there's some other
9 way to do it.

10 HONORABLE TOM LAWRENCE: And then ultimately
11 perhaps go to mandatory.

12 MR. HARDIN: Right.

13 CHAIRMAN BABCOCK: Yeah, that's a -- how
14 many people think that mandatory filing for lawyers,
15 forgetting about the pro se and the prisoners for a
16 minute, but mandatory electronic filing in the court of
17 appeals for lawyers is a good idea?

18 MR. MEADOWS: Electronic --

19 CHAIRMAN BABCOCK: Electronic filing.

20 MR. HAMILTON: As opposed to permissive?

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE LEVI BENTON: As opposed to both
23 ways or just -- it's a bad idea.

24 CHAIRMAN BABCOCK: Well, then put your hand
25 down. We're talking about a good idea.

1 PROFESSOR ALBRIGHT: Okay. I'm confused.

2 CHAIRMAN BABCOCK: Everybody put their hands
3 down. We'll try it again.

4 PROFESSOR ALBRIGHT: It looks like I'm
5 voting with Munzinger, who says he doesn't like computers.

6 MR. MUNZINGER: I love them. I just want
7 other people to do all the work.

8 CHAIRMAN BABCOCK: Munzinger is an
9 exception. Mandatory electronic filing in the court of
10 appeals, forgetting about pro ses and prisoners, and also
11 forgetting about whether you would also be required either
12 by local rule or some other way to file paper, but at
13 least you would have to file electronically in the court
14 of appeals. How many people are in favor of that?

15 MR. LOW: Are you talking about now or --

16 MR. SCHENKKAN: Chip, we don't understand
17 what forgetting about that other means.

18 CHAIRMAN BABCOCK: Say that again.

19 MR. SCHENKKAN: I don't understand what you
20 mean by forgetting about whether we do paper or not also,
21 because that's important to us, and are you saying that
22 are we in favor of mandatory even if it means there's no
23 more paper, which is a vote we haven't taken yet, or do
24 you mean mandatory and there will be some arrangement for
25 paper only -- for paper also, but it will be at least

1 permissive by the local rule?

2 HONORABLE HARVEY BROWN: And how much is it
3 going to cost?

4 CHAIRMAN BABCOCK: Why don't we try a vote
5 -- Judge Peeples, test me on this. Judge Peeples has
6 always got the right voting strategy, but what if we vote
7 on mandatory, no paper, just --

8 PROFESSOR ALBRIGHT: Even by local rule.

9 HONORABLE TERRY JENNINGS: How about doing
10 permissive first and getting that out of the way and then
11 going to mandatory and breaking it down?

12 HONORABLE HARVEY BROWN: Yeah.

13 CHAIRMAN BABCOCK: Okay. If Judge Peeples
14 seconds that then that's fine with me.

15 HONORABLE DAVID PEEPLES: I want there to
16 eventually be a vote on mandatory electronic with local
17 rule permissive paper. Eventually we need to vote on
18 that.

19 MR. LOW: I agree.

20 HONORABLE LEVI BENTON: As someone who has
21 been on the short end of a lot of local rule votes --

22 CHAIRMAN BABCOCK: In fact, you haven't won
23 one, I don't think.

24 HONORABLE LEVI BENTON: You know, I just
25 think we ought to just -- if any -- just say forget the

1 local rules stuff, because there's always going to be some
2 judge in minority who is going to feel bad about it, and
3 he can't persuade his or her colleagues to go with him,
4 and so if one judge wants a hard copy then we ought to
5 require hard copies.

6 CHAIRMAN BABCOCK: Okay. Justice --

7 HONORABLE SARAH DUNCAN: Can I tack onto
8 that?

9 HONORABLE TOM GRAY: I'd kind of like to put
10 my thoughts on the record before the vote, if I could at
11 some point.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE TOM GRAY: And I don't know if
14 this is a good time, and it may not change anybody's vote.

15 CHAIRMAN BABCOCK: You might be in the
16 majority, you might be in the dissent.

17 HONORABLE TOM GRAY: And so these are just
18 some thoughts, and I tried to distill it down based on the
19 conversation. I thought I might comment upon why there is
20 a difference of perception about the advisability of this
21 between the Supreme Court and the Court of Criminal
22 Appeals. The dollars involved are critical. Both the
23 dollars involved in the case and the availability of
24 dollars to the attorneys, because your criminal
25 practitioner is more typically a solo practitioner, and I

1 heard somebody say that the typed briefs that we get were
2 from pro se, but that's not entirely accurate over in the
3 criminal side. We still get hand-typed briefs from
4 attorney practitioners in criminal cases. So we're not a
5 completely WordPerfect or a Word technology, computer
6 technology yet.

7 Also, the CCA, they handle about 11,000
8 writs per year, most of those handwritten, so you can
9 understand why their costs of converting to a -- having to
10 print their 11 copies of 11 handwritten writs would be
11 inordinately higher than the Supreme Court's conversion
12 and ability to use this system, because there are 11,000
13 of those cases.

14 Personally for our court, I've always
15 thought it was ridiculous that we require the litigants to
16 file more than two or three copies of briefs in any case
17 or motions in any case that was not going to be orally
18 argued because we circulate the briefs with the draft
19 opinion, and we could all use the same set of briefs, but
20 I have not been able to get any traction on changing that
21 by local rules, which we could if we wanted to under the
22 existing rules.

23 To answer Pete's question about the cost of
24 the conversion to solely the electronic method, we don't
25 know because we haven't really tested this in a larger

1 environment, and I'll come back to that in kind of my
2 wrap-up comments. And in recognition of what Terry said,
3 every judge approaches how they problem solve, read
4 briefs, write opinions, fundamentally differently, I
5 think. I mean, you could do some broad categories, but
6 they're different, and what the cost is going to be for a
7 court depends on how many of the different type judges you
8 have on that court, and that can change every election
9 cycle, and it also changes as the judge matures in his or
10 her decision-making process and the relationship between
11 that judge and the other judges on the court and how
12 comfortable you feel with those other judges and what they
13 write. So this is a dynamic cost factor that you just
14 can't put a -- here's what it's going to cost to convert.

15 And if it's mandatory, essentially, I think
16 you're going to have to have it basically turnkeyed with
17 14 intermediate appellate courts at a minimum all at one
18 time, and all of that taken in context, while I can
19 envision the day when it's all electronically done and we
20 print out for those paper users like Judge Jennings, which
21 and I've been known to have, you know, racks of books, and
22 that's why I like a big top on the desk, so I can line it
23 all up. For the type of judges who still function like
24 that and function best like that, they will have to print
25 more, but for the new judges as they come on that want

1 more electronic technology or that can work with it -- I,
2 like Sarah, one of the greatest advances at my desk in the
3 last three or four years has been the addition of the
4 second screen. Huge improvement in my ability to work and
5 comprehend. I can have a case open on one side, another
6 case open on the other side, and I can have Lehmann vs.
7 Har-Con on my desk. You know, and I'm going to be reading
8 all three at the same time. And I don't know how many
9 times I've printed out Lehmann vs. Har-Con. It's been
10 many. It seems like a lot more recently, but you'll see
11 those in the future.

12 HONORABLE SARAH DUNCAN: Keep them as a PDF
13 on your desk top.

14 HONORABLE TOM GRAY: All of these
15 observations to me suggest that it be a phased
16 implementation for a optional period at first and probably
17 a pilot system in different courts as we phase it in,
18 improve it. We did this with case management as it was
19 done. We had even our largest court continued on a
20 DOS-based case management system long after the other
21 courts had converted, but we can function a little bit --
22 with a progression a little bit over time, and I think you
23 basically just -- and you can even set benchmarks at the
24 beginning or mandatory dates, and I would say that you
25 want to do at some point mandatory conversion for the

1 attorneys, then you do it mandatory for the criminal
2 attorneys in the criminal cases, then you do it mandatory
3 in civil pro se, because the whole prisoner issue is a
4 different kind of problem, but then eventually mandatory
5 for pro se inmate litigation.

6 I think to try to even begin to bite off
7 this large of a piece of technology implementation across
8 the entire state at the same time could be a monumental
9 conversion nightmare like we have seen at the government
10 level with Social Security and other functions where they
11 tried to make major changes, and it just didn't work. I
12 would very much argue in favor of a optional period of
13 time, then mandatory at different levels, and a pilot
14 system as well.

15 CHAIRMAN BABCOCK: There's no way we can
16 vote on that, that's for sure.

17 HONORABLE TERRY JENNINGS: Well, that's
18 permissive, isn't it? That's more permissive.

19 CHAIRMAN BABCOCK: Justice Gaultney.

20 HONORABLE TOM GRAY: Yeah, that would be
21 permissive at this point.

22 CHAIRMAN BABCOCK: That would be permissive.

23 MR. GILSTRAP: One question.

24 CHAIRMAN BABCOCK: Yeah, Justice Gaultney
25 first and then --

1 HONORABLE DAVID GAULTNEY: I wanted to voice
2 my support for Sarah's point that it ought to be
3 mandatory, both, initially, for some period of time.

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE DAVID GAULTNEY: Because, frankly,
6 both have their uses, both -- you know, I use the briefs
7 on the bench, I use the briefs in different contexts, I
8 use the computer in a different context. Both of them
9 facilitate decision-making.

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE DAVID GAULTNEY: It would be
12 unfortunate if an unintended consequence of our shift to
13 electronic filing is that we get less usefulness to the
14 decision-maker, so I think that the point of having both
15 for some period of time as a transition period is a good
16 idea.

17 CHAIRMAN BABCOCK: Frank, and then Bill.

18 MR. GILSTRAP: Just to help me with
19 perspective here, it's true that most of the cases -- the
20 majority of the cases in the courts of appeal are criminal
21 cases?

22 HONORABLE SARAH DUNCAN: No.

23 HONORABLE JANE BLAND: No.

24 MR. GILSTRAP: About what percentage?

25 HONORABLE TOM GRAY: 50/50.

1 MR. GILSTRAP: Okay, 50. So if we mandated
2 a totally electronic system for civil cases, half the
3 cases would still be handled as paper cases, right?

4 CHAIRMAN BABCOCK: Not necessarily.

5 MR. GILSTRAP: Well, I mean, what's the -- I
6 thought the Court of Criminal Appeals is not going to do
7 it.

8 CHAIRMAN BABCOCK: That's for their court,
9 though, not for the intermediate courts of appeals.

10 MR. GILSTRAP: I see. So the criminal cases
11 in the courts of appeal would be handled this way if the
12 Court of Criminal Appeals approves.

13 CHAIRMAN BABCOCK: That's one suggestion.

14 MR. GILSTRAP: Okay. Is that what we're
15 saying?

16 HONORABLE SARAH DUNCAN: Can I --

17 CHAIRMAN BABCOCK: Yeah, Sarah.

18 HONORABLE SARAH DUNCAN: When I left the
19 court a few years ago the Court of Criminal Appeals had a
20 system where it was scanning in everything. Are they --
21 is that y'all's system? Are they still using that system
22 that they had a few years ago?

23 MR. HERMES: As this new system is
24 implemented it will --

25 HONORABLE SARAH DUNCAN: Replace that?

1 MR. HERMES: It will join in with the common
2 system.

3 HONORABLE SARAH DUNCAN: But they are still
4 using --

5 MR. HERMES: Yes.

6 HONORABLE SARAH DUNCAN: -- an imaging
7 system so that they can capture all of this digitally.

8 MR. HERMES: They are indeed.

9 CHAIRMAN BABCOCK: Bobby.

10 MR. MEADOWS: I would like to hear the
11 argument against mandatory e-filing and local rules for
12 paper filing. I mean, it could be that a court doesn't
13 want to have paper filing and, therefore, you don't need
14 it, and the courts that want it can have it.

15 CHAIRMAN BABCOCK: Dorsaneo knows the answer
16 to that.

17 PROFESSOR DORSANEO: I don't know if I know
18 the answer, but what I've heard the justices say is that
19 when the day comes, I hope after I've retired, that we
20 have only electronic filing, that the way the courts and
21 the justices will operate will be a very different way
22 than what we are used to, and I'm not expecting that to be
23 a better way. I think there will be less reading done and
24 less attention to the final work product than we can see
25 now on an individual justice basis. I like the idea of

1 filing both and making them both mandatory because maybe
2 that will actually increase the efficiency, because some
3 people might be able to access -- I could look at a brief
4 right now on my phone, you know, if I got tired of
5 listening to this debate.

6 CHAIRMAN BABCOCK: If you're especially
7 sick.

8 PROFESSOR DORSANEO: But so filing more
9 things I don't think has any real downside, and there is
10 some upside storage costwise and otherwise.

11 CHAIRMAN BABCOCK: Levi.

12 HONORABLE LEVI BENTON: Yeah, I don't know
13 why there would be any resistance to accommodating the
14 desires of an individual judge that wants to get to a work
15 product. You know, if one judge wants paper, why would
16 we -- why does that judge have to suffer from the whims of
17 the majority?

18 CHAIRMAN BABCOCK: Judge Lawrence, and then
19 Sarah. Then Elaine.

20 HONORABLE TOM LAWRENCE: Well, it seems to
21 me we would make life easier for everybody if we either
22 started out permissive or started out with a pilot project
23 to work the bugs out, get people comfortable with it, and
24 then take the next step as you get it figured out.

25 CHAIRMAN BABCOCK: Sarah. And then Elaine.

1 HONORABLE SARAH DUNCAN: I would like to
2 speak against local rules.

3 MR. MEADOWS: Well, I invited that.

4 HONORABLE LEVI BENTON: Thank you, Sarah.

5 HONORABLE SARAH DUNCAN: When I got to the
6 Fourth Court, in their wisdom they had previously decided
7 that only four copies of any brief would be filed, and
8 that's, you know, one of the things about paper, is it's
9 pretty easy to lose, it's pretty easy to get stained with
10 iced tea or coffee or whatever. It took me 12 years to
11 get the court to go along with the rest of the state and
12 have seven copies, an original and six filed, because I
13 would always be the one that would get the brief that had
14 just been copied in the front office, and yeah, I had all
15 50 pages of the brief, but I didn't get the appendix. I
16 didn't get all 50 pages. I only got every other page,
17 so -- and most local rules are by majority vote of the
18 court, and I'm -- I agree with Judge Benton.

19 If somebody works better on a particular
20 case, and I do think it's -- I do think, as Gaultney said,
21 different uses for different formats, but if there's
22 anybody that works better with paper, I want them to have
23 paper, and I don't want the court to have to pay for it.

24 CHAIRMAN BABCOCK: Elaine.

25 PROFESSOR CARLSON: Yeah, I'm going to echo

1 what Alex said earlier. We are the last generation to use
2 paper. I'd say 95 percent of my students, law students,
3 work off of totally computers, bring computers to class.
4 There's a great debate going on in legal education on
5 whether professors should ban computers from the
6 classroom.

7 PROFESSOR DORSANEO: Absolutely they should.

8 PROFESSOR CARLSON: Because truly what has
9 happened is --

10 CHAIRMAN BABCOCK: The younger generation
11 speaks.

12 PROFESSOR DORSANEO: There's no thinking
13 going on. There's only --

14 PROFESSOR CARLSON: Recordation.
15 Recordation, which is great.

16 PROFESSOR DORSANEO: -- recordation of
17 information and we'll look at it later.

18 PROFESSOR CARLSON: And I bemoan the lack of
19 comprehension from working solely off a computer. I see
20 it in my students' recitation all the time, so I agree
21 with you, Bill, but you do take a lot of heat.

22 HONORABLE TERRY JENNINGS: So why should we
23 move that into the judiciary?

24 PROFESSOR CARLSON: Well, on the other
25 hand --

1 HONORABLE TERRY JENNINGS: And why should we
2 facilitate that and make it much more easier?

3 PROFESSOR CARLSON: On the other hand, I
4 agree with what's been said that electronic databases,
5 integrated databases, makes life wonderful in so many
6 regards. We went through the transition at our law
7 school, and for me to be working on a PT&R analysis of a
8 faculty member up for promotion and tenure and be able to
9 go to an integrated database at my house and just look
10 through the evaluations of the students maybe for the last
11 five years very quickly without any paper whatsoever on my
12 computer screen is very different from me wanting the
13 reprints of the *Law Review* articles, which I want to --

14 HONORABLE TERRY JENNINGS: So you're willing
15 to save storage space and have these wonderful things,
16 you're willing to trade off critical thinking by the
17 judiciary.

18 PROFESSOR CARLSON: I don't think, Justice
19 Jennings, we're going to be able to force the next
20 generation to read things on paper. I may be wrong, but
21 newspapers, as you know, are not doing well because
22 they're not reading them on paper. They are thinking and
23 learning differently, and we're not. I remember the same
24 debate on Rule 21a when we had this stunning two-day SCAC
25 meeting on whether or not to allow fax, service by fax,

1 which I have to explain to my students. They're like,
2 "What's an electronic document transmission?"

3 "Oh, that's what we used to call faxes."
4 Some of you were here. You remember the -- yeah. This is
5 just bringing back those feelings because, you know, the
6 horse is out of the barn, and I think the Court is exactly
7 getting it right doing it wholesale, all 14 courts and
8 Supreme Court and Court of Criminal Appeals. Document --
9 data system conversions that are done piecemeal very
10 rarely marry up well at the end, and it is a huge
11 undertaking, but it tends to end up with the best product.

12 CHAIRMAN BABCOCK: I remember seven years
13 ago when we were talking about Rule 47, TRAP Rule 47,
14 unpublished opinions, Paula Sweeney made an impassioned
15 plea against revising the rule because the unpublished
16 opinions were only available online and that a lot of
17 people didn't have computers. So, Judge Christopher.

18 HONORABLE TRACY CHRISTOPHER: Well, it seems
19 to me from the discussion of the -- from the appellate
20 judges that they're most concerned about the briefs being
21 in paper format, versus the other issues, the clerk's
22 transcript and reporter's transcript and exhibits. So I
23 don't know whether our mandatory/permissive vote is
24 talking about all of that or just briefs, because it seems
25 to me that we double-checked what the cost of the filing

1 is, and the filing cost of a brief is between 12 to \$22,
2 and presumably you -- and the appellate, unlike the trial
3 court, you're only going to file two, three pleadings
4 maybe in a case, maybe four if you've got a couple of
5 motions.

6 So we're not talking about as big a cost to
7 duplicate it, so I think we make the clerk record has to
8 be electronic, the reporter's record has to be electronic,
9 exhibits have to be electronic, no paper copy of those,
10 but paper copy of the briefs because that seems to me to
11 be --

12 HONORABLE TERRY JENNINGS: Actually, that
13 could be a lot more expensive, because, you know, at least
14 my staff lawyer and I know a lot of the staff lawyers in
15 our court they will use the hard copy. You get an appeal
16 from a motion for summary judgment with all the
17 attachments. We get an argument and we'll carry that onto
18 the --

19 HONORABLE TRACY CHRISTOPHER: I know, but it
20 will be on a computer and all 10 of them will be able to
21 use it at the same time.

22 HONORABLE TERRY JENNINGS: Well, they don't
23 need to. We only need one staff lawyer who is working on
24 the case need it at a time, and the judges are going to
25 need copies of things from the clerk's record.

1 HONORABLE TRACY CHRISTOPHER: But you're
2 only talking about printing out one or two pages for that.

3 HONORABLE TERRY JENNINGS: Some of these
4 summary judgment motions with the attachments are a
5 hundred pages or more.

6 CHAIRMAN BABCOCK: Judge Peeples, what if we
7 voted on everybody that is in favor of permissive, thereby
8 leaving all the permutations of mandatory for other votes?
9 No, you don't like that?

10 PROFESSOR ALBRIGHT: Wait, wait, wait. I
11 don't understand the vote. Oh, you're talking to Judge
12 Peeples about what's it going to be.

13 CHAIRMAN BABCOCK: Yeah, because he's the
14 vote guru. What if we --

15 PROFESSOR ALBRIGHT: He's the vote guy.

16 CHAIRMAN BABCOCK: What if we voted on how
17 many people thought that whatever electronic filing there
18 was going to be, it would be permissive. In other words,
19 if you wanted to do it, fine; if you didn't want to do it,
20 that's okay, too.

21 PROFESSOR ALBRIGHT: So I at Thompson &
22 Knight have the option of filing it electronically or
23 sending you a copy of the paper brief.

24 CHAIRMAN BABCOCK: Right.

25 PROFESSOR ALBRIGHT: Even though I have it

1 on my computer.

2 CHAIRMAN BABCOCK: Yeah. The system could
3 be that you're at Thompson Knight and you're filing
4 something in the Fifth Court of Appeals, and you could
5 send a runner down there with the paper and have it filed,
6 or you can have somebody at your office, trained by
7 Munzinger, could push a button, and it would be
8 electronically filed or not. So that's what permissive
9 is.

10 PROFESSOR ALBRIGHT: Okay.

11 HONORABLE TERRY JENNINGS: I thought
12 permissive would be what you have in place and then you
13 would permit people to file electronically if they so
14 desired, but you still have what we have in place. That's
15 kind of a phasing.

16 CHAIRMAN BABCOCK: Yeah, that's kind of what
17 I --

18 HONORABLE SARAH DUNCAN: We have that now.
19 The Fourth Court has local rules for e-filing briefs, the
20 Fort Worth court is working on the --

21 HONORABLE JANE BLAND: Yeah, we accept
22 electronic.

23 HONORABLE SARAH DUNCAN: Yeah. So that's no
24 change from --

25 CHAIRMAN BABCOCK: Do all courts of appeals?

1 MS. PETERSON: No.

2 HONORABLE JANE BLAND: I don't know if they
3 all do. The First and the Fourteenth do.

4 HONORABLE TOM GRAY: Tenth does.

5 CHAIRMAN BABCOCK: Okay. Kennon says that
6 not all of the courts of appeals accept electronic filing.

7 HONORABLE SARAH DUNCAN: But they could.

8 CHAIRMAN BABCOCK: Huh?

9 HONORABLE SARAH DUNCAN: They could, just by
10 local rule.

11 CHAIRMAN BABCOCK: Sure.

12 HONORABLE SARAH DUNCAN: We don't need a
13 statewide rule for that.

14 CHAIRMAN BABCOCK: Well, right, so you're
15 against --

16 HONORABLE TOM GRAY: But I thought you were
17 against local rules.

18 CHAIRMAN BABCOCK: That doesn't sound to me
19 like anybody is in favor of permissive. Anybody who's --

20 PROFESSOR ALBRIGHT: Why don't we just have
21 a vote on that and kill that and move on?

22 CHAIRMAN BABCOCK: -- in favor of
23 permissive, raise your hand.

24 PROFESSOR ALBRIGHT: What was the vote?
25 Wait. What's the vote?

1 CHAIRMAN BABCOCK: See, you shouldn't be
2 talking when we have a vote. Okay. Let's have lunch.
3 Except the record should reflect that six people are in
4 favor of permissive.

5 HONORABLE TOM GRAY: Oh, I think it was more
6 than that.

7 CHAIRMAN BABCOCK: It probably was, but I'm
8 hungry.

9 (Recess from 1:00 p.m. to 2:04 p.m.)

10 CHAIRMAN BABCOCK: The rain has stopped
11 maybe, down to a drizzle.

12 HONORABLE TOM GRAY: And the relevance of
13 that is --

14 CHAIRMAN BABCOCK: We're trying to do
15 weather reports now on the record.

16 MR. LOW: I have one question, is there any
17 discrepancy among opinions on this? Any varying opinions?

18 CHAIRMAN BABCOCK: About the weather?
19 Actually, the people back there think it's raining hard,
20 so who knows. Here we go. Come on, Sarah.

21 Here's the plan. We need to take some
22 votes, if we can formulate them, on when we say mandatory
23 what do we prefer, what type of mandatory do we prefer?
24 So we'll vote on that, and then we'll dig into the
25 nitty-gritty of the rules and see if we can get through

1 Rule 9 today, and I know Judge Lawrence has got something
2 on the agenda that he wants -- that he says, famous last
3 words, will only take a few minutes.

4 HONORABLE TOM LAWRENCE: I hate to curse it
5 by saying that.

6 CHAIRMAN BABCOCK: So we'll do that at the
7 end of the day, but for now, help me in formulating a vote
8 on mandatory e-filing in the court of appeals. How should
9 we craft a vote on that? Sarah, you got an idea? Alex,
10 get up from under the table, please.

11 PROFESSOR ALBRIGHT: I've got to get my
12 screen so I can pull up these documents because I don't
13 have any paper. I didn't kill any trees for this meeting.

14 CHAIRMAN BABCOCK: All right. So, Sarah,
15 how do we frame a vote here?

16 HONORABLE SARAH DUNCAN: Must a party
17 represented by a lawyer -- let me ask something first. I
18 have assumed throughout this discussion that all we're
19 really talking about is what gets filed in an appellate
20 court.

21 CHAIRMAN BABCOCK: Right. Court of appeals.

22 HONORABLE SARAH DUNCAN: By -- that is not
23 part of the record, because we can't mandate that the
24 trial court clerks and the reporters and recorders file
25 electronic --

1 HONORABLE TOM GRAY: Sure we can.

2 CHAIRMAN BABCOCK: Why can't we?

3 HONORABLE JANE BLAND: That's the plan.

4 HONORABLE SARAH DUNCAN: Because we have all
5 these counties that aren't equipped to do that.

6 HONORABLE TERRY JENNINGS: Well, you need to
7 push them.

8 HONORABLE TOM GRAY: We need a wheelbarrow
9 to push them.

10 CHAIRMAN BABCOCK: The Luddite is all of the
11 sudden switching luds here. Justice Gaultney.

12 HONORABLE DAVID GAULTNEY: Well, I think she
13 makes a good point in this sense: There's a difference in
14 my vote in whether we're talking about switching to
15 e-filing records and stuff like that, which I'm fully in
16 favor of and even I'm also fully in favor of mandating the
17 briefs. I also think that we ought to in the transition
18 period mandate paper filing of briefs, not of record. So
19 in formulating the mandatory question, it makes a
20 difference to me whether you're talking about the
21 appellate briefs or something else.

22 HONORABLE SARAH DUNCAN: And the distinction
23 I draw is the Court doesn't have a funding arm as far as I
24 know that's big enough even for it, much less for all
25 these prime counties to get them to where they have the

1 equipment to digitize the records.

2 HONORABLE NATHAN HECHT: Well, we'll look at
3 that, but that's a separate problem and needs some other
4 analysis to it, but I'm not sure that's true, because all
5 the counties are making a paper record some way, by a
6 photocopier, and any photocopier that's big enough to make
7 a record that's of any size over and over again that the
8 government owns is either -- can either scan at the same
9 time or they can buy one or trade it in on one that scans
10 at the same time. So I just don't know exactly what the
11 number is, but I doubt it's very big, as opposed to having
12 the computer infrastructure to accept filings in the trial
13 courts, which is a little bit of a different problem.

14 HONORABLE SARAH DUNCAN: Okay.

15 HONORABLE NATHAN HECHT: But somewhere
16 everywhere in this state there is a clerk standing over a
17 photocopier making the clerk's record and binding it
18 together. Most of them have wax and stuff left over from
19 the 14th century that they use to put the record together
20 so you can't take it apart and use it, but to the extent
21 that's there, I'm not sure that's much of a problem.

22 And then on the court reporter's side,
23 again, we're in constant discussion with the court
24 reporters about this whole transition and what it would do
25 and how you would get access and how their legitimate

1 proprietary rights and record would be protected and how
2 people would still get access and what we would put on the
3 internet and what we wouldn't. All of those issues are
4 still -- they're kind of on the side, but I think it's all
5 doable because almost all of the court reporters' records,
6 if not every single one in the state, is produced in some
7 way that produces an electronic copy, so I think we're
8 mostly focusing on briefs for purposes of our discussion
9 here.

10 CHAIRMAN BABCOCK: Okay. So we're talking
11 about briefs.

12 HONORABLE NATHAN HECHT: Briefs and motions
13 and --

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE SARAH DUNCAN: Must parties
16 represented by counsel file whatever they're going to file
17 in the appellate court electronically.

18 CHAIRMAN BABCOCK: Okay. So that's what
19 we're voting on?

20 MR. MUNZINGER: That it's mandatory.

21 CHAIRMAN BABCOCK: Mandatory.

22 HONORABLE SARAH DUNCAN: Must.

23 MR. HAMILTON: Mandatory or discretionary.

24 CHAIRMAN BABCOCK: Mandatory. Anybody want
25 to amend what we're voting on?

1 HONORABLE DAVID GAULTNEY: Civil and
2 criminal?

3 HONORABLE SARAH DUNCAN: Parties represented
4 by counsel.

5 CHAIRMAN BABCOCK: Parties represented by
6 counsel. Yeah. So everybody that thinks that what Sarah
7 said is a good idea, raise your hand.

8 PROFESSOR ALBRIGHT: Luddite row right here.
9 Now we've got some hands up.

10 CHAIRMAN BABCOCK: Okay. Everybody that
11 thinks it's a bad idea?

12 HONORABLE SARAH DUNCAN: Raise your hand,
13 Terry.

14 CHAIRMAN BABCOCK: Okay. That passes by a
15 vote of 17 to 5, mandatory for briefs and motion papers
16 filed by attorneys in the court of appeals for both civil
17 and criminal cases. Rusty.

18 MR. HARDIN: Can I -- I don't know if
19 anybody else is like me, but that vote by me was based on
20 the assumption we are about to also say you can file by
21 paper. If we're not going to do that, then I take my vote
22 back.

23 HONORABLE TOM GRAY: Put him over on the six
24 then.

25 MR. HARDIN: Pardon?

1 HONORABLE TOM GRAY: There's six voting
2 against the mandatory then.

3 MR. HARDIN: Right. If we're not going to
4 be next following up and saying --

5 CHAIRMAN BABCOCK: Richard.

6 MR. MUNZINGER: The motion was silent upon
7 whether it was to be accompanied or not accompanied by
8 paper, and I fully, like Rusty, expected to have a next
9 vote that would address that issue.

10 MR. HARDIN: Right.

11 MR. MUNZINGER: Because I would, like Rusty,
12 take my vote back if that's the only way to file.

13 CHAIRMAN BABCOCK: Justice Jennings.

14 HONORABLE TERRY JENNINGS: Here's what I'm
15 for. I'm for continuing paper mandatory and permissively
16 allowing e-filing, if that makes any sense.

17 HONORABLE SARAH DUNCAN: Nobody will e-file.
18 Hardly anybody will e-file. Why would somebody go to the
19 extra expense of e-filing?

20 HONORABLE TERRY JENNINGS: Well, if the Bar
21 doesn't want it and a lot of judges don't think it's
22 helpful, as Rusty said, what's driving this, other than
23 people think it's inevitable?

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE JANE BLAND: Well, you said no one

1 will use it, but apparently they're getting tens of
2 thousands of filings in the trial courts, so --

3 MS. PETERSON: That's right, and the trial
4 court rules do specify that it's optional to file
5 electronically.

6 CHAIRMAN BABCOCK: Yeah. Justice Gaultney.

7 HONORABLE DAVID GAULTNEY: I do think we
8 ought to have mandatory paper filing as well, and it would
9 change my vote as well if we're not going to do that. So
10 I would also like a second vote, which would be mandatory
11 with no paper briefs at all.

12 CHAIRMAN BABCOCK: Okay.

13 MR. HARDIN: Mandatory, no -- no paper
14 briefs?

15 HONORABLE TOM GRAY: I thought that's what
16 the vote was. It was mandatory, no paper briefs.

17 MR. HARDIN: Oh, no, it didn't say no paper
18 briefs.

19 MR. GILSTRAP: Silent on that.

20 HONORABLE SARAH DUNCAN: It just was
21 mandatory.

22 MR. HARDIN: Just mandatory electronic
23 filing was all the vote was, and that's what I'm saying.
24 If it says no paper briefs then I'm not voting for it.

25 CHAIRMAN BABCOCK: Okay. So it was either

1 17 to 5, 16 to 6, or 15 to 7.

2 MS. PETERSON: Moving right along.

3 CHAIRMAN BABCOCK: Depending on what we do
4 next.

5 MR. HARDIN: That's right.

6 CHAIRMAN BABCOCK: So the record will be
7 totally clear on this point.

8 HONORABLE TERRY JENNINGS: May I make a
9 motion?

10 CHAIRMAN BABCOCK: Yes.

11 HONORABLE TERRY JENNINGS: I vote or I move
12 that we vote on mandatory paper filings, as is the current
13 practice, and permissive e-filing.

14 MR. HAMILTON: I'll second that.

15 CHAIRMAN BABCOCK: Okay. So let's --
16 everybody that -- let me make sure I state it right,
17 Judge. Everybody that is in favor of mandatory paper
18 filing and permissive electronic filing in both civil and
19 criminal cases in the court of appeals, raise your hand.

20 Well, it was a motion and a second and a
21 third. All right. Everybody that is opposed?

22 HONORABLE SARAH DUNCAN: I'm not opposed to
23 it.

24 CHAIRMAN BABCOCK: All right. That failed
25 by a vote of 13 to 3. The 3 voting in favor, 13 voting

1 against. Okay. Who's got another vote? Richard.

2 MR. DUGGINS: Mandatory paper filing.

3 MR. MUNZINGER: The filing of the paper
4 briefs and motions should be the same as in the current
5 rules in addition to the electronic -- mandatory
6 electronic filing.

7 CHAIRMAN BABCOCK: Okay.

8 MR. LOW: For attorneys.

9 CHAIRMAN BABCOCK: And Rusty seconds that,
10 so --

11 HONORABLE SARAH DUNCAN: I'm sorry, I must
12 have misunderstood that.

13 MR. HARDIN: Paper filing as it is now.

14 MR. MUNZINGER: There would be no amendment
15 to the paper filing rules, Sarah, but there would be
16 mandatory electronic filing.

17 PROFESSOR CARLSON: No, no, no. Mandatory
18 paper, mandatory electronic.

19 CHAIRMAN BABCOCK: If you want this on the
20 record you're going to have to talk one at a time.

21 HONORABLE SARAH DUNCAN: We already voted on
22 that.

23 MR. HAMILTON: Yeah, we already voted on
24 that.

25 CHAIRMAN BABCOCK: Kent.

1 HONORABLE KENT SULLIVAN: I assume that --

2 THE REPORTER: Speak up, please.

3 HONORABLE KENT SULLIVAN: I assume that one
4 of the very significant advantages of electronic filing is
5 to reduce long term storage costs, and so I wonder in
6 connection with the current proposal if we're talking
7 about paper filings that would largely be courtesy copies
8 and that the clerks would not need to retain as part of
9 the permanent record, if that's what you're really talking
10 about, as opposed to the need for us to officially retain
11 two separate copies.

12 MR. HARDIN: Right, so how are you going to
13 phrase the vote? I think most people agree with that, but
14 how are you going to phrase it?

15 HONORABLE KENT SULLIVAN: My proposal was
16 just to try and clarify it. I assume that what's on the
17 table is the proposal that there be paper copies that
18 would be courtesy copies effectively to facilitate review
19 by the court.

20 CHAIRMAN BABCOCK: Well, no, the proposal on
21 the table was that we would file just like we do now,
22 which is not a courtesy copy. It's a file-stamped copy.

23 HONORABLE KENT SULLIVAN: I thought there
24 was another proposal saying you would file both. Did I
25 misunderstand that?

1 CHAIRMAN BABCOCK: Well, no. It was going
2 to be mandatory electronic and paper copies filed without
3 change, just like we always do.

4 HONORABLE KENT SULLIVAN: Right. And I
5 guess what I was trying to suggest is, is the intent
6 behind that that they actually officially maintain as part
7 of the official record both copies, or is it simply an
8 acknowledgement that many people still want the
9 availability of a paper copy, but you wouldn't have to
10 retain it?

11 CHAIRMAN BABCOCK: It's a separate question,
12 though, because the electronic filing will have an
13 electronic file stamp on it.

14 HONORABLE KENT SULLIVAN: Right.

15 CHAIRMAN BABCOCK: And the paper copy will
16 have a manually applied file stamp, and they can be
17 different, timingwise, all sorts of things. Yeah,
18 Richard.

19 MR. MUNZINGER: It's my motion, so I believe
20 I have the right to amend it, is that correct, under
21 Robert's Rules of Order?

22 MR. MEADOWS: It is America.

23 CHAIRMAN BABCOCK: I don't know about
24 Robert, but --

25 HONORABLE TERRY JENNINGS: Nobody is pushing

1 you yet.

2 CHAIRMAN BABCOCK: -- this is America, so
3 you can amend your own motion.

4 MR. MUNZINGER: Having adopted a rule that
5 mandates electronic filing, I move that we adopt a rule
6 that maintains the current paper filing rules as they are,
7 but allows the clerk or the court at its discretion to use
8 the electronically filed copy as the permanent record of
9 the court.

10 CHAIRMAN BABCOCK: Harvey.

11 HONORABLE HARVEY BROWN: I don't know if you
12 would accept this as a friendly amendment, but there's a
13 question as to which date you use for the filing. I would
14 propose that the electronically filed one be the official
15 filed one, so if you hit your computer at 11:50 p.m.
16 you're okay, and you don't have to have somebody at the
17 post office at that time, too.

18 MR. MUNZINGER: Harvey and I are friends,
19 and that's a friendly amendment accepted in my motion.

20 CHAIRMAN BABCOCK: What if you start
21 uploading at 11:50, but you don't get it uploaded until
22 12:05?

23 MR. HARDIN: You think you can word it now?

24 CHAIRMAN BABCOCK: Okay. State the motion
25 again with the friendly amendment.

1 MR. MUNZINGER: Okay. Having adopted a rule
2 mandating electronic filing, we adopt a rule that
3 maintains the current requirements for paper filing that
4 leaves to the discretion of the court or the clerk which
5 of the two filings is the permanent record of the court
6 and adopts as the filed brief and/or motion the electronic
7 version thereof.

8 CHAIRMAN BABCOCK: Okay. Everybody in favor
9 of that, raise your hand.

10 MR. HAMILTON: Can I ask a question?

11 CHAIRMAN BABCOCK: No, don't raise your
12 hand. Carl's got a question.

13 MR. HAMILTON: That to me is going to be
14 confusing because if there's a paper file and they put a
15 file stamp on it and it's got a different time or date
16 than the electronic one --

17 MR. MUNZINGER: No, I understand, but --

18 HONORABLE HARVEY BROWN: Yeah, pick one.
19 You've got to pick one.

20 MR. MUNZINGER: One of the two has to be
21 chosen as the official --

22 MR. HAMILTON: The clerk of the court gets
23 to pick which one?

24 MR. GILSTRAP: Let's leave off the filing
25 date. Let's just drop that part.

1 CHAIRMAN BABCOCK: Huh?

2 MR. GILSTRAP: Let's drop the filing date.

3 Let's worry about that later.

4 CHAIRMAN BABCOCK: Hey, this is America, and
5 it's his motion.

6 MR. HATCHELL: May I ask a question?

7 CHAIRMAN BABCOCK: Yeah.

8 MR. MUNZINGER: My personal belief is that
9 practitioners need to have certainty when they file
10 something that they have met our requirements for our
11 malpractice carriers, our obligations to our clients, et
12 cetera, require that we work with some definitely known
13 time frame and have some assurance that we can do -- that
14 we have done what we're supposed to do, and I believe it
15 would be better to have a rule that recognizes that the --
16 that one of the two is the correctly filed copy. That's
17 my personal opinion, and I would decline to, in a friendly
18 way, accept an amendment to my motion changing it.

19 CHAIRMAN BABCOCK: Hatchell's got a
20 question, and then Carl.

21 MR. HATCHELL: Does your motion include the
22 record as well as briefs?

23 MR. MUNZINGER: Yes.

24 MR. HAMILTON: If I go to the clerk's office
25 and I get the file because I want to see when somebody

1 files something --

2 CHAIRMAN BABCOCK: Right.

3 MR. HAMILTON: -- and I look at the paper
4 copy and it's got a file stamp on there, then I can't
5 believe that that's correct. I've got to somehow go look
6 at some electronic filing.

7 MR. MUNZINGER: Well, then you need to have
8 a secretary that knows how to do that. I mean, because
9 that's what -- I'm not being ugly to you. I would say to
10 my secretary, "Get the dadgum electronic copy and show it
11 to me."

12 CHAIRMAN BABCOCK: Kennon wants to say
13 something.

14 MS. PETERSON: When we had a provision in
15 there requiring a hard copy of any document that's been
16 electronically filed, one of the other provisions that was
17 in the rules is that that copy should say on the front
18 cover, bold font, "This is a copy of a document that's
19 been electronically filed," and that way the
20 electronically filed document is the original document.
21 It's when you hit send, that's for recordkeeping and
22 archiving, all of that jazz, it covers it, but then this
23 paper copy, it's clear on the front -- like this is a copy
24 of something that's been filed electronically, and what's
25 going to govern is when you hit send for the file, the

1 file date. Does that make sense? So when you're
2 submitting an electronic --

3 MR. HAMILTON: When I go to the court and
4 look at the file and I look at the hard copy, what's on
5 there to tell me when it actually got filed?

6 MS. PETERSON: I guess we could require
7 something else on there to say "submitted in the clerk's
8 office to record" when it was filed electronically if need
9 be, or you would just access the document online to figure
10 out when the file date is. There are a couple of
11 different ways to approach it, I think.

12 MR. HAMILTON: Very confusing.

13 CHAIRMAN BABCOCK: Okay. You want to
14 restate your -- since we're doing this in broad strokes
15 here.

16 MR. MUNZINGER: Well, having adopted a rule
17 mandating electronic filing of records, brief, motions, et
18 cetera, in the courts of appeals when an attorney is
19 representing a party, my motion is that the current rules
20 requiring paper filing remain in force, that the
21 electronically filed material be the official filed copy
22 thereof so that the time of filing, date and time of
23 filing, is as noted on the electronically filed record,
24 and that it be discretionary with courts and clerks as to
25 which documents are maintained as the permanent records of

1 the court, whether they're paper or electronic. That's my
2 motion.

3 HONORABLE TERRY JENNINGS: So mandatory
4 paper, mandatory e-filing, the court decides which one is
5 official.

6 MR. MUNZINGER: Yes, sir.

7 CHAIRMAN BABCOCK: Okay. Everybody in favor
8 of that, raise your hand. Make up your mind, Hayes.

9 MR. FULLER: It's been amended so many times
10 I'm not exactly sure what --

11 HONORABLE TRACY CHRISTOPHER: Me, too.

12 CHAIRMAN BABCOCK: They need you to say it
13 again.

14 MR. MUNZINGER: Well, Justice Jennings just
15 said it. Mandatory paper, mandatory electronic, leave it
16 to the court as to which is the permanent filed record,
17 and the official filing is the date and time of the
18 electronic filing. That's the motion.

19 MR. FULLER: Leave it to each individual
20 appellate court to decide which is which.

21 MR. MUNZINGER: Each individual appellate
22 court would determine which is the permanent record of
23 court, the hard copy or the electronic copy.

24 MR. FULLER: So one appellate court could
25 have hard copy, another appellate court could have

1 electronic copy.

2 MR. MUNZINGER: That's correct. And the
3 reason I didn't specify numbers of copies is because
4 Justice Jennings says when he goes to his printer all the
5 judges are standing there printing cases and printing
6 copies, so why would you say just print two or three, or
7 file two or three. Everybody may want one. Just leave it
8 like it is. The courts are getting along now with their
9 budgets the way they are. They may be cutting corners,
10 but they're getting along with the number of filed copies.
11 There is no move by the appellate courts to increase or
12 decrease the number of filed copies. If you leave it as
13 it is you haven't changed anything, except you've come
14 into the 21st century with electronic filing. You have a
15 certain way of filing, and you have allowed courts to
16 reduce their storage costs in the long term should that
17 prove beneficial and desirable.

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE SARAH DUNCAN: What is the reason,
20 Richard, for letting the court decide which is the
21 permanent record?

22 MR. MUNZINGER: Well, because your San
23 Antonio court, I've heard you say any number of times, any
24 number of different meetings that y'all have -- you're
25 terribly underbudgeted and you've cut corners that I don't

1 hear other people saying.

2 HONORABLE SARAH DUNCAN: No.

3 MR. MUNZINGER: And I don't mean that
4 critically of you or of your court.

5 HONORABLE SARAH DUNCAN: I'm not there
6 anymore, but San Antonio actually is -- the San Antonio
7 Court of Appeals has more money per judge, not in
8 appropriated funds but in --

9 MR. MUNZINGER: Well, then I misunderstood,
10 but you have articulated your problems as a justice making
11 photocopies and doing things that took time away from your
12 ability to be a judge, to read, to think, to ponder, to
13 confer, et cetera, et cetera, et cetera, and --

14 HONORABLE TERRY JENNINGS: How can our court
15 get some of your court's money?

16 HONORABLE SARAH DUNCAN: I'm not there
17 anymore. I have no say in this. But I still don't
18 understand, why does the court get to decide which is the
19 permanent record of the court?

20 MR. MUNZINGER: Well, they may have a better
21 contract in Dallas with paper filing than they do
22 electronic filing, and I don't know that it necessarily
23 affects the administration of justice for the Supreme
24 Court of Texas to say you've got to keep your records
25 electronically. It's a management question that's left up

1 to the court's management as distinct from a judicial
2 question addressing the efficiency of justice and what
3 have you. I'm not married one way or the other to it. I
4 just -- the clerks themselves have may have thoughts about
5 it.

6 CHAIRMAN BABCOCK: Hayes.

7 MR. FULLER: Let me work through this.

8 First of all, I have a problem with unfunded mandates, and
9 I have a problem with us mandating procedures for
10 appellate courts unless we're mandating a good procedure
11 and effective procedure, one that works, one that
12 everybody has confidence in, and one that is funded.
13 Okay. I have a real problem with that. At the same time
14 I think the electronic filing, electronic storage, this is
15 the way it's headed, this is the way it needs to go, this
16 is where we're ultimately going to end up.

17 We may be putting the cart before the horse
18 here, and I don't pretend to understand how we fund the
19 local appellate courts and where those come from, state
20 funds or county funds or whatever, but conceptually here's
21 what I think is going to have to happen if we're going to
22 have electronic filing and we're worried about the
23 official record and the correct date of filing. I'm going
24 to use the analogy taken from what Lexis/Nexis filing
25 service is doing with the local MDL, and it also addresses

1 the issue of those courts that are rich, those courts that
2 are poor, those courts that can afford it, those courts
3 that can't, and down to the district level.

4 Ultimately what I envision is a big server
5 that's well backed up, and the data on that server is
6 going to be the official record. That server is going to
7 have to be in Austin or wherever you want to put it.
8 Whenever you file electronically you're going to have to
9 do two things. You're going to have to profile your
10 document by lawsuit, court, cause number, parties,
11 everybody you want to be served, and where you're filing
12 it, and you're going to have to serve it on all the
13 appropriate parties, and that is something Lexis/Nexis
14 does now. If I file a document in a case with a hundred
15 parties in the MDL court, for instance, it goes online.
16 It is served on every interested party. There is no
17 reason why courts and clerks could not be included in that
18 service list, and I get a record of the filing and the
19 time it's filed, and it serves -- we use it as the
20 official record, and so does Judge Davidson.

21 That system might work. It's very
22 centralized, and it gives you a central electronic
23 repository, and then each county is not determining or
24 each court is not determining, lord, how many servers do
25 we have to have, are these the right kind of servers,

1 blah-blah-blah-blah-blah. The official record is that
2 central repository. Now, who is going to pay for that,
3 you're going to have to talk to the Legislature, I
4 presume, and they may not like that, but I do know there's
5 a difference between storing things electronically or in
6 paper between, say, Houston and Waco.

7 We have this debate in our firm as to
8 whether or not we want to go digitally, whether we want to
9 take our old files and scan them and store them
10 electronically because, you know, it's so efficient.
11 Office space or old buildings in Waco are so cheap, it is
12 cheaper for us to just store a bunch of paper than it is
13 to scan all of that paper and store it electronically and
14 maintain an electronic archive, and I suspect those
15 differences are throughout the state.

16 But that's just some thoughts to throw out
17 there, and I really think -- I mean, the more I sit here
18 and think about it, I mean, this is the way we need to go.
19 If we're going to go that way, in order to get people
20 there and on the same page, it's got to be mandatory and
21 the system has to be, you know, the same for everybody,
22 and it needs to be the same throughout the state, but at
23 the same time, I think it's presumptuous of us and a
24 little premature for us to mandate that now until we know
25 what it is we're mandating. And people are not going to

1 be happy with it if they don't have confidence that what
2 we're mandating is a good system, one that will work, that
3 they can have confidence in, and one that's paid for, and
4 preferably the one that they're not paying for, that
5 somebody else is paying to set up for them, but --

6 CHAIRMAN BABCOCK: So you're going to vote
7 "no" on Munzinger's motion, right?

8 MR. FULLER: So I'm not sure. I mean, I'm
9 not sure. I haven't heard the motion -- I mean, there's
10 been some pieces of every motion that's been made that I
11 kind of like.

12 CHAIRMAN BABCOCK: His motion is mandatory
13 electronic, mandatory paper, discretion of the court on
14 the date. Ralph.

15 MR. DUGGINS: I'd like to offer an
16 alternative to that, unless you want to vote on that now,
17 and mine would be that we have mandatory e-filing, which
18 would be the permanent record of the court, and by local
19 rule or at the request of any judge or clerk you may
20 require a party to file one or more hard copies of the
21 brief.

22 That would eliminate Sarah's cost concern,
23 and it facilitates the inevitable transition to electronic
24 filing that Sarah so beautifully stated that it's
25 inevitable, and I think that balances the need to

1 transition to that, but at the same time yields a way for
2 any judge or clerk to require a hard copy to be filed.

3 CHAIRMAN BABCOCK: Of course, that raises
4 another problem that Sarah has about local rules, which
5 she and Levi don't like.

6 MR. DUGGINS: I said it can be by local
7 rule, at the request of any individual judge or the clerk.

8 CHAIRMAN BABCOCK: Okay. Well, that is
9 different than Richard's, so let's vote on Richard's --

10 MR. DUGGINS: Okay.

11 CHAIRMAN BABCOCK: -- then we'll vote on
12 that one. So everybody that is in favor of Richard's
13 proposal, which is mandatory electronic, mandatory paper,
14 and discretion on the court as to which file date
15 controls, raise your hand.

16 MR. MUNZINGER: Mine was electronic file
17 date controls, the courts have discretion as to which is
18 the permanent record.

19 CHAIRMAN BABCOCK: Okay.

20 MR. MUNZINGER: For recordkeeping purposes.

21 CHAIRMAN BABCOCK: Okay. Everybody in favor
22 of that, raise your hand.

23 Everybody opposed? That fails by a vote of
24 15 to 3, 15 against, 3 in favor. Now let's go to Ralph's
25 proposal. State that again, Ralph.

1 MR. DUGGINS: We would have mandatory
2 e-filing, which would constitute the permanent record. By
3 local rule or at the request of any individual judge or
4 the clerk of the court, a party may be required to file
5 one or more hard copies of the brief. I think that's it.

6 CHAIRMAN BABCOCK: Okay.

7 PROFESSOR CARLSON: Or the record or
8 anything?

9 MR. DUGGINS: Pardon me?

10 PROFESSOR CARLSON: The record or just the
11 briefs?

12 MR. DUGGINS: I thought we had already gone
13 past the record. That's why I didn't address it.

14 CHAIRMAN BABCOCK: Well, we've gone past it,
15 and then we've doubled back.

16 MR. DUGGINS: I'm open to suggestions on how
17 to deal with that.

18 CHAIRMAN BABCOCK: Harvey.

19 HONORABLE HARVEY BROWN: One comment, one
20 thing I don't like about that is I don't know that I want
21 judges to have to come out publicly and say, "I'm the,"
22 quote, "dinosaur that's requiring you to file a brief when
23 all my brethren don't, and they're all computer
24 sophisticated."

25 MR. HARDIN: This is the Terry Jennings

1 Protection Act?

2 HONORABLE HARVEY BROWN: That's right.

3 HONORABLE TERRY JENNINGS: Thank you.

4 HONORABLE HARVEY BROWN: I could see that
5 being in the paper. I could see that being a campaign
6 issue someday, and I don't want to --

7 CHAIRMAN BABCOCK: Well, we'll have a forum,
8 we'll call it judge --

9 PROFESSOR CARLSON: It could be anonymous.

10 CHAIRMAN BABCOCK: It will be the Luddite.
11 It will be the Luddite thing. And, by the way, we were
12 trying to think, this is important, we think that Jennings
13 may be the youngest member in this room.

14 HONORABLE TERRY JENNINGS: Oh, I doubt that.

15 CHAIRMAN BABCOCK: I didn't say the youngest
16 looking.

17 HONORABLE JANE BLAND: No. I am
18 significantly younger.

19 CHAIRMAN BABCOCK: Well, that was the
20 consensus down here. I don't know.

21 HONORABLE TERRY JENNINGS: Well, the two
22 youngest members of the panel are the most likely to be
23 dinosaurs.

24 CHAIRMAN BABCOCK: Okay, so Jennings and
25 Bland are the youngest people in the room; is that right?

1 HONORABLE JANE BLAND: Pemberton has left.

2 PROFESSOR CARLSON: And Perdue.

3 CHAIRMAN BABCOCK: Well, Perdue. We figure
4 Perdue is the youngest, but he's not here. Yeah, Carl.

5 MR. HAMILTON: Well, in the trial courts,
6 you file electronically and then they make copies of
7 everything and distribute them to the court, so if we
8 adopt a rule here that says you have to file hard copies,
9 too, then the trial courts are going to do the same thing.
10 Then we're back to where we started from. So --

11 CHAIRMAN BABCOCK: Yeah, these votes have a
12 circular quality to them, I can tell.

13 MR. HAMILTON: So then in the trial court
14 we're going to have to e-file and file hard copies, too,
15 so we really haven't accomplished much.

16 CHAIRMAN BABCOCK: Ralph, you're not talking
17 about trial courts.

18 MR. DUGGINS: No, I want to respond to
19 Harvey's comment. I think that's why I added the clerk,
20 so all the judge has to do is ask the clerk to issue a
21 directive "submit X copies of the brief."

22 HONORABLE HARVEY BROWN: Okay.

23 MR. GILSTRAP: So the clerk loses the
24 election.

25 MR. DUGGINS: Clerk is appointed at the

1 appellate court level.

2 CHAIRMAN BABCOCK: Okay. Everybody in favor
3 of Ralph's proposal, raise your hand.

4 Okay. Everybody against? Gene.

5 MR. STORIE: My only option was it should be
6 permissive both ways, and you know, some people may have
7 difficulty using the electronic. If that's two percent of
8 the people, why make it harder for them to file their
9 brief, and I don't think we voted on that, so I'll be the
10 lone vote for that.

11 CHAIRMAN BABCOCK: Okay. Ralph's suggestion
12 passed by a vote of 19 to 1.

13 PROFESSOR DORSANEO: I have a question about
14 it.

15 CHAIRMAN BABCOCK: And but not without
16 question. Yes, Bill.

17 PROFESSOR DORSANEO: We're going to serve
18 the written briefs, too, or just electronically serve
19 people?

20 CHAIRMAN BABCOCK: You're going to serve the
21 courtesy copy to everybody?

22 PROFESSOR DORSANEO: Yeah.

23 MR. GILSTRAP: Local rule.

24 PROFESSOR DORSANEO: Yeah.

25 HONORABLE LEVI BENTON: I would say no.

1 PROFESSOR DORSANEO: I'm happy if the
2 answer's "no." I just would like to know what the answer
3 is.

4 HONORABLE LEVI BENTON: Let the parties bear
5 the costs of printing it out. They've got it
6 electronically.

7 CHAIRMAN BABCOCK: As long as it's no
8 different.

9 HONORABLE LEVI BENTON: And as long as the
10 party is represented by counsel.

11 CHAIRMAN BABCOCK: Yeah. Right. Okay. Any
12 other votes anybody wants to take?

13 Okay. Let's go to Rule 3.1(e), which I
14 think is the first suggested change to the TRAP rules, and
15 this is in the definitions.

16 MS. PETERSON: And the drafting notes
17 throughout the document refer to the JP rules that the
18 TRAP amendments are modeled after, and you all have not
19 only a map that shows where e-filing has been -- either
20 they have rules that have been adopted or they actually
21 implemented it, but you also have a copy of the JP rules
22 and a copy for the template for the rules in the district
23 court so you can see -- compare what's in the TRAPs with
24 what's there for the JP courts and the district courts.

25 HONORABLE NATHAN HECHT: And the JP rules

1 are in the West pamphlet, too, in the back.

2 MS. PETERSON: Yes. So "convenience fees"
3 is really just taken straight from the JP rules. "Digital
4 signature" is also taken from the JP rules. The only
5 difference is it's a little bit more extensive than the JP
6 rules. JP says, "Digital signature means a confidential
7 and unique electronic identifier issued to a filer upon
8 registration with TexasOnline." This one says same thing,
9 "Confidential and unique electronic identifier issued to
10 an individual who completes the initial registration
11 procedures that TexasOnline establishes and provides on
12 its website," because those requirements were kind of
13 scattered throughout the JP rules. It's now a part of the
14 definition.

15 "Digitized signature" is straight from the
16 JP rules. "Electronic filing," very similar, but one of
17 the differences -- and this is potentially a discussion
18 area, and then definition of "electronic filing" in the
19 TRAP rules, it says, "A process by which an individual
20 sends a court document to an appellate court," so on and
21 so forth. In the JP rules the definition is "A process by
22 which a filer files the court document," and the reason
23 for the difference is as follows: There are a number of
24 appellate courts that receive documents rather than filing
25 them.

1 It's apparently a practice -- I can't
2 identify which courts, but I know like the Fourteenth
3 Court of Appeals, for example, will receive certain
4 documents, and so there's been a lot of debate about
5 whether with this electronic filing system that's going to
6 do away with the practice of receiving documents, and so
7 this is a proposed solution that came actually from the
8 general counsel for the Court of Criminal Appeals. It's
9 just to make "electronic filing" a term of art where
10 you're sending the document electronically on, and then
11 whether it's received or filed happens at the appellate
12 court.

13 PROFESSOR DORSANEO: I have a question. I
14 know that I probably asked this question before and was
15 given an answer, but where did the term "convenience fee"
16 come from? I mean, it seems like quite an odd term.

17 MR. GILSTRAP: *Nineteen Eighty-Four*. That's
18 where it came from.

19 MS. PETERSON: That may be true.

20 PROFESSOR CARLSON: George Orwell.

21 PROFESSOR DORSANEO: Is that some sort of a
22 nationwide term that people who know about this use or --

23 MS. PETERSON: Well, Judge Dietz wants to
24 change it to "inconvenience fee," but --

25 PROFESSOR DORSANEO: Why not just call it an

1 electronic filing fee?

2 MS. PETERSON: I'm not really sure, to be
3 honest. This comes from the district court rules and the
4 JP rules, and I thought the district court rules were
5 worked out, to a certain extent, by this committee.

6 HONORABLE NATHAN HECHT: Uh-huh.

7 PROFESSOR DORSANEO: That's why I thought I
8 might have asked this question before.

9 HONORABLE NATHAN HECHT: Same answer.

10 MS. PETERSON: Yeah, same answer.

11 PROFESSOR DORSANEO: Same who knows why.

12 CHAIRMAN BABCOCK: George Orwell. That book
13 was published in 1949, by the way.

14 HONORABLE TOM GRAY: If the e-filing is
15 mandatory it should not be a convenience fee. We're going
16 to just have to increase the filing fee. It's just part
17 of it, so if it's mandatory that definition needs to go
18 away.

19 MS. PETERSON: And if you look at the
20 definition of "convenience fee" -- well, I guess -- I
21 think it's broad enough. Is this -- and, Mike, you can
22 help me, but I think "convenience fee," the definition is,
23 "A fee charged in connection with electronic filing that
24 is in addition to regular filing fees." So the term is
25 actually not referring solely to the convenience fee that

1 an appellate court would charge. It's referring also to
2 the fee that TexasOnline and the EFSP would charge.

3 HONORABLE TOM LAWRENCE: But part of this
4 was designed to get the counties some extra funds to
5 develop the technology. That was the purpose of the
6 convenience fee, and, you know, I guess it was
7 contemplated that that fee could go away at some point,
8 although that would be unusual for a governmental agency
9 to do that.

10 MR. HARDIN: I was going to say, that would
11 be the first time ever.

12 CHAIRMAN BABCOCK: Well, and doesn't it make
13 a difference if it's -- if county by county they have the
14 option of either opting into this or not, whereas here
15 it's going to be everybody's got to do it? So it seems to
16 me like maybe a filing fee is the better way to go than a
17 convenience --

18 MS. PETERSON: Just increasing the filing
19 fee.

20 CHAIRMAN BABCOCK: Yeah. If you got to do
21 it, you got to do it.

22 MS. PETERSON: Does that have to be done
23 through legislation, the filing fees?

24 HONORABLE NATHAN HECHT: I'm not sure about
25 that. Probably, but I'm not sure.

1 HONORABLE TOM LAWRENCE: But, Mike, isn't
2 this convenience fee -- didn't the Legislature establish
3 that when they first set up the framework for this?

4 MR. GRIFFITH: The Legislature when they set
5 up TexasOnline allowed the Department of Information
6 Resources Board to set fees for use of TexasOnline, and
7 that's how this came about. There is a provision in there
8 for local governments or state agencies to charge a fee
9 for using TexasOnline. So that's the parenthetical
10 bracket part there that the court could charge a fee if
11 they wanted to do so.

12 HONORABLE TOM LAWRENCE: And that fee could
13 go to the courts of appeals to defray some of the costs.

14 MS. PETERSON: We don't know.

15 HONORABLE TOM LAWRENCE: In theory.

16 MS. PETERSON: In theory.

17 MR. GILSTRAP: Why don't we call it what it
18 is, an additional electronic filing fee? You know, it's
19 extra money we're charging for filing electronically.

20 HONORABLE TERRY JENNINGS: Call it a
21 computer tax.

22 MS. PETERSON: I don't want to call it a
23 tax.

24 CHAIRMAN BABCOCK: Well, the only reason I
25 could see against that, Frank, is this is a term that is

1 now being used in other courts.

2 HONORABLE TOM LAWRENCE: In the other two
3 filing packages this is used.

4 CHAIRMAN BABCOCK: Yeah. So if you're going
5 to -- I'm not sure you want to have it at all, but if
6 you're going to have it, I wonder if you should be
7 switching terms on people, even though it makes sense.

8 Okay. Any other comments? Yeah, Bill.

9 PROFESSOR DORSANEO: Kennon, did I hear you
10 say it's charged by -- or we don't know who it's charged
11 by, did we say?

12 MS. PETERSON: It's charged by -- later on
13 in the rules it addresses that, but TexasOnline and the
14 EFSP charge -- well, both charge a fee, and then there
15 could be a third fee imposed by an appellate court, and
16 all of those are called a convenience fee. And we can
17 change it, but that's just the way it's worked.

18 PROFESSOR DORSANEO: I like definitions that
19 inform me of what's being defined. I mean, because if a
20 fee could be charged by three different -- three different
21 parties, I'd like the definition to say that.

22 MS. PETERSON: So you would like convenience
23 fee, and if it's not going to be the appellate court,
24 which I guess that requires a vote, but if it were just
25 EFSP and TexasOnline, it would be "convenience fee means

1 a charge" -- "means a fee charged by TexasOnline or an
2 EFSP in connection with electronic filing that is in
3 addition to regular filing fees."

4 CHAIRMAN BABCOCK: Okay. Yeah, Carl.

5 MR. HAMILTON: This electronic filing
6 definition about "sends a court document," elsewhere we
7 define it as "transmitting" and in some places we talk
8 about "sent," and some places "transmitted." Is there --

9 MS. PETERSON: You know, I noticed that, and
10 I think it needs to be cleaned up. Part of the reason I
11 didn't do that yet is I didn't know whether the definition
12 of "electronic filing" was going to stay the same, and the
13 language about transmitting coming from the rules for the
14 lower courts.

15 MR. DUGGINS: And your computer has a send
16 button.

17 MS. PETERSON: And your computer has a send
18 button.

19 CHAIRMAN BABCOCK: Justice Gray.

20 HONORABLE TOM GRAY: In discussing the use
21 of labels, I noticed another term that I haven't noticed
22 before in the rules, is the use of the term "individual."
23 Normally we use "person," it seems to me, because that
24 includes corporations. "Individual" probably doesn't, but
25 it may have been intentional. I just don't know.

1 MS. PETERSON: No. So across the board to
2 change references to "individual."

3 PROFESSOR DORSANEO: To "person," yes.

4 MS. PETERSON: To "person."

5 HONORABLE TOM LAWRENCE: The only comment I
6 would make is we ran into this when we did the JP rules a
7 couple of years ago, was we wanted to go back and change
8 things, but there's an argument to be made for having the
9 language consistent in all three sets of e-filing rules as
10 much as possible.

11 MS. PETERSON: Well, and that actually gives
12 rise to a change that has been made. In the JP rules and
13 in the district court and county court rules there is the
14 term "filer," and I found that awkward to talk about the
15 filer files, the filer does this, and I thought it was
16 clearer to just refer to the party when possible or to
17 what will now be the person, and so there is a change in
18 terminology that's occurred in this draft to take out the
19 term "filer." I guess the reason that that was in there
20 before, and maybe you know, is because sometimes the filer
21 is a different individual. For example, an executive
22 assistant than the actual attorney, so that, you know,
23 there may have been some concern somewhere along the way
24 about using the term "party" when it's really going to be
25 the executive assistant or the paralegal filing the

1 document, and I don't know if that's why.

2 HONORABLE TOM LAWRENCE: If anybody knows it
3 would be Mike. I don't remember.

4 MR. GRIFFITH: I don't know. I don't recall
5 the exact reason, but that certainly sounds plausible. I
6 didn't write the rules, but I think that's probably right.

7 PROFESSOR DORSANEO: I think it's a good
8 idea to use as little jargon as possible.

9 MS. PETERSON: Uh-huh.

10 PROFESSOR DORSANEO: When I deal with my
11 technical people I don't understand what they're talking
12 about because they're talking in some sort of secret
13 language that they use, and I think that that's a bad way
14 for us to proceed, even if we didn't always follow that
15 pattern.

16 CHAIRMAN BABCOCK: However, we're going to
17 have to have the 300 DPI phrase in here for Judge
18 Christopher.

19 HONORABLE TRACY CHRISTOPHER: No, no, I'll
20 tell you where it needs to go. 9.2, which we aren't at
21 yet.

22 MS. PETERSON: Okay. So --

23 CHAIRMAN BABCOCK: Okay.

24 MS. PETERSON: -- moving from --

25 HONORABLE TRACY CHRISTOPHER: I'm paying

1 attention.

2 MS. PETERSON: What's that?

3 HONORABLE TRACY CHRISTOPHER: I said I'm
4 paying attention. You're looking at me.

5 MS. PETERSON: To electronic service
6 provider, again this is modeled after JP rule,
7 specifically, 2.1(g). The change that's been made is in
8 the JP rules. First it says, let's see, "means a business
9 entity that provides electronic filing services and
10 support to its customers," in parentheses "filers." So
11 this has just been changed to say "means a business entity
12 that provides electronic filing and support services,"
13 period.

14 And the next sentence, "An attorney or law
15 firm may act as an EFSP" is in the JP rules, but as I
16 understand it, there are zero law firms acting as EFSPs
17 right now, and I don't -- I'm assuming this is here to
18 just give rise to the possibility that one day a law firm
19 will act as an EFSP, but that could lead to other
20 discussions about problems that could arise from that.

21 "Registered e-mail address," the next
22 definition, also modeled after the JP rules, but what has
23 been added is the second sentence. "For purposes of these
24 rules the term 'e-mail address' encompasses registered
25 e-mail address, thus if these rules require a party to

1 provide an e-mail address and if the party has a
2 registered e-mail address, the party must provide his or
3 her registered e-mail address," and that was just to avoid
4 the need throughout the rules to "registered e-mail
5 address" versus "e-mail address," and the idea is you
6 should use that e-mail address if you have it.

7 PROFESSOR DORSANEO: I assume --

8 CHAIRMAN BABCOCK: Comments about that?
9 Bill.

10 PROFESSOR DORSANEO: -- these electronic
11 filing service providers don't need to be licensed or --

12 MS. PETERSON: They do have to be approved,
13 and they go through an approval process that Mike
14 explained to me yesterday, if you want to hear the
15 approval process.

16 PROFESSOR DORSANEO: But if they're
17 attorneys or law firms they don't?

18 MS. PETERSON: They would have to go through
19 the approval process as well.

20 PROFESSOR DORSANEO: Then what does it
21 matter if they're an attorney? Then what is the point of
22 that sentence then?

23 MS. PETERSON: I don't know. It's pulled up
24 from all the other rules.

25 HONORABLE NATHAN HECHT: Well, rather than

1 hire somebody to be your EFSP, you could do it yourself if
2 you wanted to do it in-house and you could
3 technologically.

4 PROFESSOR DORSANEO: And then you wouldn't
5 need to be approved?

6 HONORABLE NATHAN HECHT: No, you'd still
7 need to be approved.

8 HONORABLE TOM LAWRENCE: But you wouldn't
9 have to pay an extra fee.

10 HONORABLE NATHAN HECHT: Because
11 TexasOnline -- they won't take anything from the world.
12 They just take it from these seven or eight or nine people
13 that send them things, and so you -- otherwise they won't
14 take your stuff, but if you wanted to get approval as a
15 law firm, as I understand it, you could, and nobody has.

16 HONORABLE TOM LAWRENCE: And then you could
17 save having to pay that fee if you were your own EFSP.

18 MR. GRIFFITH: Part of the fee.

19 HONORABLE TOM LAWRENCE: No, not the
20 convenience fee. The other one.

21 PROFESSOR DORSANEO: I think the definition
22 ought to say if they're licensed or approved that you're
23 approved, myself, and by who.

24 CHAIRMAN BABCOCK: Is this here because
25 there was some suggestion, Judge Lawrence, or anybody

1 else, that maybe an attorney or a law firm wouldn't be --
2 would be prohibited per se from being an EFSP?

3 HONORABLE TOM LAWRENCE: No. And, Mike,
4 refresh my memory, but I think what Justice Hecht said is
5 why we did it, is that if somebody decided they didn't
6 want to go through an ESP all the time or an FSP, rather,
7 that they could just become registered themselves or
8 approved through the process themselves and do it
9 themselves if they wanted to. I mean, that was the
10 policy.

11 CHAIRMAN BABCOCK: Yeah, but Bill's point
12 is, well, why single out lawyer or law firm? I mean,
13 either you're approved or not approved, so why have a
14 separate sentence for a lawyer or law firm?

15 PROFESSOR DORSANEO: And the separate
16 sentence, you know, suggests to me, you know, like an
17 attorney or a law firm or an attorney can be a real estate
18 agent without being a real estate agent.

19 CHAIRMAN BABCOCK: Without being licensed.

20 PROFESSOR DORSANEO: And that's what I
21 thought that was trying to say.

22 HONORABLE TOM LAWRENCE: Well, I guess,
23 correct me if I'm wrong, Mike, but I guess what we were
24 thinking is that either it would be a company that's in
25 that business that would be trying to do that or it could

1 be any other lawyer or law firm that wanted to do it that
2 would be filing cases. I think that's why we did it like
3 that.

4 PROFESSOR DORSANEO: But you could only do
5 it for yourself, under your thinking.

6 HONORABLE TOM LAWRENCE: No, not
7 necessarily.

8 MR. GRIFFITH: If a large firm wanted to
9 become an electronic filing service provider, they could
10 do that, and they could sell those services to somebody
11 else.

12 CHAIRMAN BABCOCK: There's an idea for you,
13 Mike.

14 HONORABLE NATHAN HECHT: See, it occurred to
15 me at one point that if you were, for example, collecting
16 delinquent taxes and you were filing thousands of lawsuits
17 at a time, you might want to be your own EFSP rather than
18 pay Lexis to file it for you. I think it's less likely
19 that that would ever happen in -- just for the appellate
20 filing, but if you were an EFSP for any purpose you could
21 file under the appellate rules, too. But I wouldn't think
22 an ordinary law firm would want to go to the trouble to do
23 this when they could just have a contract with Lexis or
24 whoever.

25 CHAIRMAN BABCOCK: Okay. What's next,

1 Kennon?

2 MS. PETERSON: Next is "TexasOnline,"
3 definition comes straight from the JP rules. It's just
4 the difference is in the JP rules it's not in the
5 definition or the terms section. It's in section 4.1, but
6 it's the same language, and then if you look at the JP
7 rules, there's a lot about TexasOnline in the rules
8 themselves, so part of what I did with this comment is
9 just put some of the information -- I pulled it out of the
10 rules because it didn't seem to fit there, and so the
11 comments that are in here are just intended to explain the
12 edits and also to move some of the text that seemed a
13 little inappropriate for actual rule text into the
14 comments. So that's what you see in the comment on that
15 page. Moving on --

16 MR. DUGGINS: Well, can I ask one question?
17 Why does it say that TexasOnline is the infrastructure
18 through which state agencies and local governments may
19 electronically send? It allows the EFSP to do the same or
20 no?

21 HONORABLE NATHAN HECHT: No. The EFSP is
22 your guy. TexasOnline is the state's guy.

23 MR. DUGGINS: But isn't TexasOnline the
24 entity that receives the e-filing from the lawyer?

25 HONORABLE NATHAN HECHT: No.

1 MS. PETERSON: The EFSP does. So lawyer to
2 EFSP to TexasOnline.

3 HONORABLE NATHAN HECHT: To TexasOnline.

4 MR. DUGGINS: Well, then shouldn't it then
5 add EFSP in addition to state agencies and local
6 governments or not?

7 HONORABLE NATHAN HECHT: No. TexasOnline is
8 the portal through which you have to go to reach the
9 government. EFSPs are the only people who can go through
10 the portal, but you have to go through TexasOnline to get
11 to the government.

12 MR. DUGGINS: Okay. Thank you.

13 CHAIRMAN BABCOCK: Just one thing, Kennon,
14 on (o).

15 MS. PETERSON: Uh-huh.

16 CHAIRMAN BABCOCK: Is the tense right on
17 that last "required payments"? Should it be "require"
18 instead of "required"? Read the whole sentence.

19 MS. PETERSON: Let's see. I think it's
20 right.

21 HONORABLE TOM LAWRENCE: Well, I think you
22 have to make the payment before anything happens.

23 MS. PETERSON: So it's a required payment.

24 HONORABLE TOM LAWRENCE: So it's a required
25 payment. If you don't pay, nothing gets filed generally.

1 CHAIRMAN BABCOCK: Okay. I'm with you.

2 MS. PETERSON: And one change I glossed over
3 on accident. In 3.2, Rule 3.2, you see that the term
4 "paper" has been changed -- "papers" has been changed to
5 "documents," and this is a change that's been made
6 throughout the rules to take out the reference to "paper"
7 and make it "document," so that it will work in both the
8 paper and electronic world.

9 Another change that's been made throughout
10 the rules is to require an e-mail address, if any. So
11 those are just two kind of global changes that I won't go
12 over line by line from this point forward.

13 HONORABLE TOM GRAY: Chip, I would be remiss
14 and I would have 13 other intermediate chief justices
15 asking why I didn't ask this question, since we frequently
16 like to refer to ourselves as something other than a state
17 agency, why we couldn't add TexasOnline, da-da-da,
18 "through which courts, state agencies, and local
19 governments."

20 PROFESSOR DORSANEO: Uh-huh.

21 CHAIRMAN BABCOCK: Okay.

22 MR. MUNZINGER: Chip?

23 CHAIRMAN BABCOCK: Yeah.

24 MR. MUNZINGER: Someone made the comment
25 about making it clear that EFSPs have to be licensed or

1 certified. Has that been adopted, or are we leaving EFSP
2 just to be an EFSP without making certain that it is
3 authorized or licensed and what have you to interface with
4 TexasOnline?

5 MS. PETERSON: It has to be approved, but
6 it's not addressed in the rules probably that an EFSP has
7 to be approved, but there is an approval process for an --

8 HONORABLE TOM LAWRENCE: I think it might be
9 helpful if they just kind of ran through the process just
10 real quickly.

11 MR. MUNZINGER: All I'm concerned about
12 would be the practitioner selecting an EFSP that isn't
13 authorized to do business with TexasOnline and is misled
14 or harmed or his client is misled or harmed because he's
15 dealt with an EFSP, and he doesn't -- he's like me, he
16 doesn't know an EFSP is supposed to be hooked up with
17 TexasOnline. We know that TexasOnline is the agency that
18 receives all Texas filings, but that doesn't mean
19 everybody knows that. That's my only point.

20 MS. PETERSON: Yeah, in looking at the
21 definition of "electronic filing service provider" you
22 could incorporate something like "means a business entity
23 approved by Bearing Point" or you could incorporate into
24 the definition to make it clear that it has to be an
25 approved entity.

1 MR. MUNZINGER: I would think that would be
2 beneficial to the Bar.

3 CHAIRMAN BABCOCK: Sarah. Justice Hecht.
4 No, Sarah.

5 HONORABLE SARAH DUNCAN: I'll defer to
6 Justice Hecht.

7 CHAIRMAN BABCOCK: She'll defer to you.

8 HONORABLE NATHAN HECHT: How do you find an
9 EFSP?

10 MR. GRIFFITH: The way you find an EFSP is
11 you go to TexasOnline, and we list those that are
12 certified and licensed to operate to connect to us. If
13 they're not on that list they can't connect to us, and you
14 won't be able to e-file anyway.

15 MR. MUNZINGER: It certainly would be
16 beneficial to the Bar to know that. You go to TexasOnline
17 and then you select one of those 10 guys or whatever it
18 is.

19 HONORABLE SARAH DUNCAN: Looking at the
20 rules that were adopted for the participating JP courts,
21 that was one of the things that Kennon handed us all. I
22 think we ought to include what's in 4.1 of the JP rules,
23 which explains how a document is e-filed, where you have
24 -- that you have to be registered to become an EFSP, what
25 the website is. I think we ought to just go ahead and

1 include that.

2 MS. PETERSON: It's in there. It's just
3 later on in the rule. It's in 9.

4 HONORABLE SARAH DUNCAN: Oh.

5 MS. PETERSON: We just haven't gotten there
6 yet. To me it made -- that seemed to be about the
7 mechanics.

8 MR. DUGGINS: 9.2.

9 MS. PETERSON: Uh-huh.

10 HONORABLE SARAH DUNCAN: I see.

11 CHAIRMAN BABCOCK: Okay, but we're steadily
12 marching toward Rule 9.

13 MS. PETERSON: Steadily.

14 CHAIRMAN BABCOCK: Now, what about the
15 comment? Hayes. I'm sorry.

16 MR. FULLER: Just quickly, just an
17 informational point. You hook up with an FSP or a --
18 yeah, an FSP. That's who you -- you give your electronic
19 document to the FSP. They then send it to TexasOnline.
20 Where does that data reside, and how does it get to the
21 court? Does the court access TexasOnline?

22 MR. GRIFFITH: That's correct. The clerk
23 actually will log onto TexasOnline to review the document,
24 and then once they accept it, it's then sent to what will
25 be the TAMES system that operates for the appellate

1 courts.

2 MR. FULLER: So basically if we are all
3 serving electronic documents on a particular -- or filing
4 electronic documents with a particular court, whether it's
5 JP or appellate or whatever, it's going to reside on a
6 TexasOnline server?

7 MR. GRIFFITH: It's going to pass through a
8 TexasOnline server to the intended court and then it's --

9 MR. FULLER: It will then reside on their
10 servers?

11 MR. GRIFFITH: That's correct. Once they
12 accept it, it then transfers to them and it purges from
13 our system.

14 MR. HERMES: So TexasOnline, one, is the
15 main switchboard that everything must go through, and
16 another way of looking at it is it's a conduit, and any
17 filing that goes through has only a short life there.

18 MR. FULLER: Okay.

19 MR. HERMES: I think it's a month, so that
20 if there's any problem with delivery it can be retried,
21 and then while that filing is only transient within
22 TexasOnline, there's a permanent record kept there so that
23 proof of delivery is always available through TexasOnline.

24 MR. FULLER: So in order for us to have
25 electronic filing for every court throughout the state of

1 Texas, each court, county or appellate court, is going to
2 have to have its own servers on which to store the data
3 for that court.

4 MR. HERMES: To receive it, yes, to receive
5 it onto -- just as you at your home, you have your counter
6 or something where your mail lands after the USPS is done
7 with it.

8 MR. FULLER: Is that the best way to do it?
9 I mean, it just seems to me that in order for us to make
10 this work someday we're going to have to have an awful lot
11 of servers scattered around the state, and the appellate
12 courts are going to have to have theirs that are funded by
13 the state, and the district courts and the JP courts are
14 going to have to have theirs that are funded by the
15 county, and if the counties can't afford it then they're
16 not going to have it, so we're not going to have it
17 throughout the state.

18 I mean, I may be wrong in my understanding,
19 but I think, as I alluded to earlier, when we use
20 Lexis/Nexis with the MDL court, Lexis/Nexis services are
21 basically you can look up any number of courts on
22 Lexis/Nexis and see if documents have been filed there,
23 because as I understand it that electronic image resides
24 on Lexis's servers for all the courts.

25 MR. HERMES: You know, I know a little bit

1 about their operation in Colorado, and that's not the case
2 for their Colorado operation. To address another part of
3 what you were asking about the best way, Texas is one of
4 11 states where court funding is almost entirely local,
5 and if that were to change to state funding and, you know,
6 money is power, where the money resides is the power to
7 make the choices, then the Legislature would have to
8 accept a huge new cost at the state level.

9 MR. FULLER: Well, maybe not. There's
10 another way to do it. If my understanding is right and
11 like Lexis has one big server that hosts all the courts'
12 data, basically everybody who participates in that
13 electronic system would pay for it. So that provider, and
14 it could be a government provider or it could be a private
15 provider, would get funds from the state, funds from the
16 county, funds from private individuals. Anybody who used
17 that system could fund it, and if they charged too much
18 for it, let it out for bid and see if somebody else can do
19 it better, but that one data, that one central server
20 hosting everybody's data, that would be the official
21 record, and that's what everybody would focus on in terms
22 of maintaining security, making sure it's upgraded.

23 I mean, don't mean to reinvent the wheel
24 here, but we're making an awful lot of rules for something
25 that I don't see any -- I mean, I don't know -- I mean,

1 there's some counties in this state that are never going
2 to have a server that I trust to maintain a permanent
3 record.

4 MR. HERMES: And on the other hand, there
5 are many counties -- what you're saying I think probably
6 would have had a really good chance, say in 1980, but now
7 there's a lot of sunk investment in most counties, and
8 certainly not all, but a lot of counties have a lot of
9 commitment to their existing technology infrastructure.

10 MR. FULLER: Okay.

11 HONORABLE NATHAN HECHT: But the Legislature
12 is meeting down the street, and I think good ideas like
13 that should be promoted, but --

14 MR. FULLER: I'm not sure it's a good idea.
15 I was just trying to -- I mean, I feel like I'm a little
16 bit behind the curve here. I feel like we're trying to
17 make rules for a system that may not necessarily be the
18 best system.

19 HONORABLE NATHAN HECHT: Well, but it's the
20 only one --

21 MR. FULLER: We've got.

22 HONORABLE NATHAN HECHT: -- practical
23 realities allow.

24 CHAIRMAN BABCOCK: Yeah, Bill.

25 PROFESSOR DORSANEO: I think it would help

1 the definition of "electronic filing service provider,"
2 which I'm going to resist calling an EFSP, because I don't
3 like to talk like that, if it said --

4 CHAIRMAN BABCOCK: It's so becoming when you
5 do, though.

6 PROFESSOR DORSANEO: Yeah. If we were at
7 least told that the electronic filing service provider
8 electronically transmits documents to TexasOnline and --

9 MS. PETERSON: And that's in the rules as
10 well.

11 PROFESSOR DORSANEO: Well, it would be good
12 if it's in the definition. I'm thinking like, okay, we're
13 going to teach this in class. This is now civil
14 procedure, right, Elaine? They're going to say, "What
15 does that mean, Professor?" You know, the definition
16 ought to say what it means a little better.

17 CHAIRMAN BABCOCK: So you can say, "Read it
18 yourself, you dummy."

19 MS. PETERSON: Yeah. Don't you want to be
20 necessary to piece it together and explain it?

21 PROFESSOR DORSANEO: And did you say that
22 "document" now means electronic documents, too, right?

23 MS. PETERSON: Yeah, the term "document" is
24 intended to address both the paper, piece of paper, and a
25 page, so it's supposed to work --

1 PROFESSOR DORSANEO: So shouldn't we have a
2 definition of "document" then that says that? I mean,
3 people think of a document, they think of paper.

4 MS. PETERSON: I don't know.

5 HONORABLE LEVI BENTON: They think of a
6 physical thing.

7 MS. PETERSON: I guess for me I think of
8 document as electronic and paper, but maybe --

9 HONORABLE TOM GRAY: You're special.

10 MS. PETERSON: I'm special, in a good way.
11 So I don't know. Do you think we need a definition?

12 HONORABLE NATHAN HECHT: We'll think about
13 it.

14 MS. PETERSON: Okay.

15 HONORABLE TOM LAWRENCE: Bill, some of what
16 you're saying is in 9.2 about defining FSPs. A lot of
17 that's in 9.2, a lot of these definitions in the
18 procedures.

19 HONORABLE NATHAN HECHT: Marching on.

20 MS. PETERSON: Marching on. Okay. So I
21 think now we're on Rule 6.

22 CHAIRMAN BABCOCK: All right. No comments
23 about the comment. No more comments about the comment,
24 right?

25 MS. PETERSON: Right.

1 CHAIRMAN BABCOCK: Okay. So now we're on 6.

2 MS. PETERSON: So Rule 6 has been amended to
3 make the procedure for designating lead counsel the same
4 for all parties and to address the way you designate lead
5 counsel for -- with e-filed documents, and so what you see
6 is a deletion of subdivision (b) of 6.1 because now
7 subdivision (a) is broad enough to address both the
8 appellant and any other party. So moving on --

9 CHAIRMAN BABCOCK: Any comments on that?
10 Yeah, Gene.

11 MR. STORIE: I just have one, and I looked
12 into e-filing several years ago, and we called a couple of
13 other states, as I recall. I think one of them was
14 Oregon, and they said that they loved e-filing, but they
15 didn't like their Attorney General getting all of the
16 notices from the court, so changing signature to the top
17 name on the block, I'm not sure if it would have that
18 effect for Greg Abbott or for any other firm principals,
19 but I just thought I would mention that.

20 CHAIRMAN BABCOCK: Wow. Okay. Any other
21 comments about 6.1(a)? All right. Go ahead, Kennon.

22 MS. PETERSON: So moving on to 9.1 for
23 signing -- and it's 9.1 --

24 CHAIRMAN BABCOCK: Hang on, don't we have
25 some comments to 6?

1 MR. DUGGINS: 6.6.

2 MS. PETERSON: Yeah, the comment is just
3 explaining the amendments.

4 CHAIRMAN BABCOCK: Any comments about the
5 comment? Okay. Move on to 9.

6 MS. PETERSON: Okay. 9.1, so in (a) and (b)
7 that's just the change I mentioned earlier that's global,
8 and that's to require e-mail addresses, if any. And (c)
9 is where you can see a lot of the new language about
10 signatures on electronically filed documents. (c)(1) is
11 taken from the JP rules, that you have to use your digital
12 signature to electronically file a document. The first
13 sentence of (c)(2) is also taken from the JP rules.
14 That's just basically saying your digital or digitized
15 signature on an e-filed document is a signature for
16 purposes of signature requirements in these rules and
17 other law.

18 The second sentence is new to the appellate
19 rules, and it actually stems from a concern raised by
20 Richard Orsinger, and that is what if you have a document
21 that contains -- that's filed by one person that has that
22 person's digital signature but then has a digitized, i.e.,
23 scanned signature, from another individual or person, how
24 do you resolve that tension. And so if you look here in
25 the second sentence, "If the document is filed using a

1 digital signature belonging to one person but contains a
2 digitized signature belonging to a different person, the
3 digitized signature controls; otherwise the digital
4 signature on the document is deemed to be the signature of
5 the attorney whose name first appears in the signature
6 block on the document." So this language is similar to
7 what's in 6.1 for designating lead counsel.

8 MR. MUNZINGER: Is the digital signature
9 some kind of a secret code that talks computer to
10 computer?

11 MS. PETERSON: It's an electronic unique
12 identifier that you receive upon registering with
13 TexasOnline.

14 MR. MUNZINGER: So if I get something that
15 you filed and we're adversaries, and your digital
16 signature, I would not see it.

17 MS. PETERSON: That's right.

18 MR. MUNZINGER: My computer might or their
19 computer. The digitized signature is a reproduction of --

20 MS. PETERSON: That's exactly right.

21 MR. MUNZINGER: -- your handwritten
22 signature. And either will suffice under the rules?

23 MS. PETERSON: Right, and if there's a
24 conflict, the digitized signature is going to control.

25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: The digitized signature could
2 be different from the lawyer who signed the document whose
3 signature is imaged and sent?

4 MS. PETERSON: The digitized signature is
5 going to be the same as that, because if the lawyer
6 physically signs the document, that will become the
7 digitized signature if it gets scanned in. The digital
8 signature is just what's there automatically. When you
9 log onto your EFSP you use your digital signature and then
10 when you file that's what gets associated with the
11 document.

12 MR. HAMILTON: But the digital signature is
13 just like a number or something.

14 HONORABLE NATHAN HECHT: It's like a
15 password.

16 MR. HAMILTON: Like a password.

17 MR. MUNZINGER: If I've read these
18 correctly, I need not have a digitized signature, I need
19 not sign my name to anything filed electronically. All I
20 have to do is press the button, and it is automatically
21 signed by me electronically.

22 MS. PETERSON: Yes.

23 MR. MUNZINGER: If I have a number that has
24 been accepted by the EFSP and TexasOnline, et cetera, et
25 cetera.

1 MS. PETERSON: Right.

2 MR. MUNZINGER: I've done the registration
3 necessary.

4 MS. PETERSON: And even if you haven't, I
5 think, because let's say your executive assistant files
6 the document for you. The digital -- I think this is
7 right, that it's going to be deemed to be the first name
8 on the signature block will be -- so that it's not going
9 to be just the filer's -- and I know I'm getting back to
10 the terminology we got away from, but it's not going to be
11 my executive assistant's digital signature that controls.
12 It's going to be the first name on the signature block.

13 MR. MUNZINGER: All right. Jackson & Walker
14 has offices in Houston, Dallas, Austin, Timbuktu, Beijing,
15 et cetera. Does it have one digital signature for all
16 lawyers in its firm or does each lawyer in its firm have a
17 digital signature?

18 MS. PETERSON: Mike, maybe you can speak to
19 how it works?

20 MR. GRIFFITH: Each lawyer will have their
21 unique password to log on, and that identifies them as the
22 filer.

23 MR. MUNZINGER: And that is a requirement of
24 the EFSP, so that I'm with a small firm in El Paso, Texas,
25 but we've got 30 lawyers. Is there one signature for my

1 firm, or are there 30 digital signatures for my firm?

2 MR. GRIFFITH: There are 30 digital
3 signatures for your firm.

4 MR. MUNZINGER: So when we register with an
5 EFSP we're going to have to -- I know we already are, but
6 let me just educate myself. Somewhere or another my
7 number is different from my law partners.

8 MR. GRIFFITH: That's correct.

9 MR. MUNZINGER: Thank you.

10 CHAIRMAN BABCOCK: Judge Christopher.

11 HONORABLE TRACY CHRISTOPHER: I could be
12 wrong, but that digital signature never hits my file.

13 MS. PETERSON: Yeah.

14 HONORABLE TRACY CHRISTOPHER: No. I mean,
15 what I see is the document that shows Joe Blow with a
16 little slash at the signature block. Whether Jane Bland
17 actually filed the document when she passworded in does
18 not show up in the document I get. I only see Joe Blow's
19 name on the signature block, and my clerk is going to
20 enter Joe Blow's name as lead attorney. Jane Bland's name
21 will never show up, so this is wrong. The digital
22 signature never shows up. It's only a means of filing.

23 MS. PETERSON: That's right. That's what I
24 was saying earlier. My understanding was that it's the
25 first name -- it's deemed to be the first name on the

1 signature block.

2 HONORABLE TRACY CHRISTOPHER: No, but what
3 you're saying is the digital signature controls. That's
4 not true. We don't know what the digital signature is.
5 It's only what is actually on the actual document, the
6 person's name there. However you signed into TexasOnline
7 and filed something doesn't show up on my pleading.

8 MR. HERMES: That's the digitized signature
9 controls.

10 HONORABLE TRACY CHRISTOPHER: Well, which
11 one is the digitized signature?

12 MS. PETERSON: That's the scanned image.

13 MR. MUNZINGER: Picture.

14 HONORABLE TRACY CHRISTOPHER: The digital
15 signature means nothing, okay, from a -- and it doesn't
16 need to be in this rule because it doesn't show up on the
17 document. It's only a means of filing.

18 CHAIRMAN BABCOCK: What would you call the
19 slash, "Charles L. Babcock"? What is that?

20 HONORABLE TRACY CHRISTOPHER: That is just
21 what your secretary puts on there.

22 CHAIRMAN BABCOCK: I know, but that's what
23 you see.

24 HONORABLE TRACY CHRISTOPHER: It's got
25 nothing to do with being a digital signature or a

1 digitized signature. It's neither of those things. It's
2 just you're showing that you've signed it or that -- it's
3 just your representation that you're filing it
4 electronically.

5 MS. PETERSON: I did see in Federal, in some
6 of the Federal court rules, that they have that backslash
7 S, and so the secretary can enter it in --

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE TRACY CHRISTOPHER: I mean, a lot
10 of times I get documents with absolutely nothing in the
11 signature block, and, you know, whoever the first name is,
12 that's the attorney of record. That's who the clerk
13 enters in. Nothing is actually required to show up in the
14 signature blank.

15 HONORABLE NATHAN HECHT: Get Mike to clarify
16 this on the record.

17 CHAIRMAN BABCOCK: Speak up, Mike, because
18 we need to hear this.

19 MR. GRIFFITH: It may not be on the document
20 itself, but it is in the metadata that's sent to the case
21 management system, so that information is available as the
22 filer as well as the attorney as part of that information
23 that goes into their case management system.

24 HONORABLE TRACY CHRISTOPHER: I don't
25 think -- I don't think that's right. I think our clerk

1 looks at the pleading, the original petition that comes
2 in, and looks at the person on the signature blank and
3 puts that person in as lead counsel, not whatever
4 metadata --

5 MS. PETERSON: That's what this.

6 HONORABLE TRACY CHRISTOPHER: -- is stuck in
7 the document.

8 MS. PETERSON: And maybe I'm missing
9 something in our communication, but the digital signature
10 is deemed to be that, and so that's all the person
11 entering the data sees, and that's all they need to see
12 because --

13 HONORABLE TRACY CHRISTOPHER: But the
14 digital signature means nothing. It's just a means of
15 filing.

16 HONORABLE NATHAN HECHT: Well, there's an
17 easy way to fix this. Mike, in the TAMES project when a
18 lawyer signs on and files something for somebody else
19 using his digitized signature then --

20 PROFESSOR ALBRIGHT: Why don't we call it a
21 password?

22 HONORABLE TRACY CHRISTOPHER: It's a
23 password. That's all it is.

24 HONORABLE NATHAN HECHT: I'm asking the
25 questions.

1 PROFESSOR ALBRIGHT: Oh, sorry.

2 HONORABLE NATHAN HECHT: When they do that,
3 what does the clerk on the other end of the transmission
4 see, or can they see?

5 MR. GRIFFITH: When the clerk is processing
6 the filing they will see who the attorney is, they will
7 see who -- actually they can list all of the attorneys.
8 They can see all of those, they can see who actually filed
9 it, if it was the attorney, the paralegal, or whomever.
10 So all of that information is on the screen when the clerk
11 pulls it up.

12 HONORABLE NATHAN HECHT: Even though the
13 person's name is not on the document that's being
14 transmitted, they would see that name as being part of the
15 filing process because it was that password or signature?

16 MR. GRIFFITH: That's correct.

17 CHAIRMAN BABCOCK: Now hang on. Roger, then
18 Richard.

19 MR. HUGHES: Well, maybe the Federal
20 experience provides a little illustration here. The
21 signature gets tied in with sanctions; and so what the
22 Federal rule was, is that the lawyer who files it signs it
23 for the purpose of sanctions and then the lawyer who types
24 the backslash, my name, in there is also a filer; and what
25 happens when you examine the docket in the Federal court,

1 which we aren't able to do yet in our system, it not only
2 will show the document and what day it was filed, it will
3 disclose the name of the attorney who logged on and
4 transmitted the document and gave their password to get it
5 filed, so that when they want to know who is responsible
6 for sanctions purposes, they can look on the docket sheet
7 and see whose lawyer's password put it in and then they
8 can look at the pleading and see who typed the backslash;
9 and then those are the miscreants who will have to come
10 face the music.

11 CHAIRMAN BABCOCK: What if as a lawyer I
12 gave my password to an associate or a --

13 MR. WALLACE: That's a no-no.

14 CHAIRMAN BABCOCK: -- paralegal?

15 MR. HUGHES: Well, that's going to be a
16 problem because the feds have -- at least by local, the
17 local rules of the Southern District, if you give
18 your name -- if you give your password and let somebody
19 else file it, it's just like handing out blank checks.

20 CHAIRMAN BABCOCK: And then what does that
21 mean?

22 MR. HUGHES: You can be held liable under
23 the Federal sanctions rule for false pleadings. If you
24 give your secretary the power to use your number to get on
25 and file documents, it's as if you signed it even if your

1 secretary did it.

2 CHAIRMAN BABCOCK: All right. I'm sorry,
3 Richard, then -- well, whoever it was.

4 MR. MUNZINGER: That was my point earlier.
5 I use computers. I didn't mean to suggest that I'm a
6 Luddite or, well, a dumbbell I am, but a dumbbell, not a
7 Luddite. I use computers, but I don't sit there at 6:00
8 o'clock at night and press the buttons to see that it gets
9 to the clerk on time. My legal assistant does that. Now,
10 if a clerk is going to get my legal assistant's
11 identification number and the rule says whoever shows up
12 first is the lead counsel, my legal assistant is going to
13 be get getting all the mailings from all my adversaries
14 instead of me.

15 PROFESSOR CARLSON: No.

16 MS. PETERSON: But it's the signature block
17 on the document.

18 MR. MUNZINGER: I know your rule says
19 signature block, but he says the clerk is getting an
20 electronic code that lets the clerk identify who the
21 person is. He may be getting Donna Crafton, certified
22 legal assistant, Scott Hulse, El Paso, Texas. I don't
23 know if the clerk in Tyler, or El Paso for that matter, is
24 going to pick it up that that's not the lawyer, that's the
25 legal assistant.

1 MS. PETERSON: But didn't he say --

2 CHAIRMAN BABCOCK: Mike says that's not
3 right.

4 MR. GRIFFITH: The clerk will actually see
5 who the attorney is by name, and they'll also see who
6 filed on the attorney's behalf, if it was the attorney him
7 or herself or if it was a legal assistant that did it.

8 MS. PETERSON: And I thought in reading the
9 JP rules what it said, "The digital signature on any
10 document electronically filed is deemed to be the
11 signature of the attorney whose name appears first in the
12 signature block," and so I thought the effect of that was
13 even if Jane, executive assistant Jane, has filed the
14 document electronically, she filed it for attorney Joe,
15 whose name is first in the signature block, so that's
16 deemed to be the person who is on the line. It's his
17 signature on the document.

18 MR. GRIFFITH: That's correct.

19 CHAIRMAN BABCOCK: R. H., did you have
20 something?

21 MR. WALLACE: Well, I mean, I guess if you
22 wanted to do it that way I guess you could do it that way.
23 It's my understanding going back to the Federal, it's
24 whoever's S slash name appears. That name has to match up
25 with the password for that person. So you could have two

1 or three attorneys, and maybe the second attorney is the
2 one that has the S slash his name, as long as it was his
3 password that was used to sign on, that would be okay.

4 MS. PETERSON: The only issue I could see
5 with that is that if you do have an administrator actually
6 doing the filing then there's going to be a disconnect
7 there between the identifier, the password, and what's on
8 the document, with the signature slash.

9 MR. WALLACE: Well, she -- well, I don't
10 know, my secretary does it all the time and logs in with
11 my password.

12 MS. PETERSON: Okay. Maybe that's what
13 happens, but --

14 HONORABLE TRACY CHRISTOPHER: But the
15 Federal system is very different in terms of how it
16 captures the password than the way TexasOnline works.

17 MR. WALLACE: Okay.

18 HONORABLE TRACY CHRISTOPHER: They're just
19 two totally different systems, and you only need like one
20 person to register for TexasOnline, and anybody in the law
21 firm can file under that one person who registered.

22 MS. PETERSON: But Mike's shaking his head
23 "no."

24 CHAIRMAN BABCOCK: Mike says "no."

25 MR. GRIFFITH: Actually, the attorney must

1 register in order to e-file. Once the attorney registers,
2 that attorney can delegate to someone else to file on his
3 or her behalf, but the attorney must be registered.

4 CHAIRMAN BABCOCK: Can a secretary register
5 with TexasOnline?

6 MR. GRIFFITH: A secretary can, but can only
7 file on someone's behalf.

8 CHAIRMAN BABCOCK: Okay.

9 MS. PETERSON: So that needs to be worked
10 into the rules. I didn't know it was a requirement for
11 each attorney to register in order to be able to file
12 electronically.

13 CHAIRMAN BABCOCK: Bill, then Alex.

14 PROFESSOR DORSANEO: I have been reading
15 this paragraph over and over and over again.

16 CHAIRMAN BABCOCK: Which paragraph?

17 PROFESSOR DORSANEO: The (c)(2), 9.1(c)(2),
18 and I understand the first sentence, except I'm not
19 altogether sure what "otherwise provided by law or these
20 rules" would be about. That's very mysterious. "Digital
21 or digitized signature is a signature on the document for
22 purposes of the signature requirements in these rules."
23 Well, that's about -- I understand what that's about,
24 okay, but then we go to the next sentence, we get down to
25 "the digitized signature controls." Controls for what

1 purpose? Controls for the purpose of the signature
2 requirements in these rules or other law or for some other
3 purpose?

4 I mean, do we get both of them as was
5 explained up there in the Federal system, or do we only
6 get the one who sent a picture of the signature? I think
7 it's completely ambiguous on that point.

8 MR. HAMILTON: I have a question about that,
9 too. Are we using "digital" and "digitized"
10 interchangeably?

11 PROFESSOR DORSANEO: No.

12 PROFESSOR CARLSON: No. See page one.

13 PROFESSOR DORSANEO: "Digitized" is a
14 picture, like your computer can probably sign your name on
15 a letter if your secretary wants to.

16 HONORABLE SARAH DUNCAN: If we have a brief
17 and Mike physically signs it, but I file it with my
18 digitized signature, my unique, the number, the secret
19 code --

20 MS. PETERSON: Digital.

21 HONORABLE SARAH DUNCAN: -- that let's me
22 file it, his signature will control. His physical
23 signature will control over my digitized signature.

24 MS. PETERSON: Digital.

25 HONORABLE SARAH DUNCAN: So when we are

1 sanctioned for that brief, he will be the one who's
2 sanctioned, not me.

3 MR. HAMILTON: When the person on the other
4 end gets this document, do they see his signature?

5 HONORABLE SARAH DUNCAN: I assume so.

6 MR. HERMES: If it's digitized, yes.

7 HONORABLE TRACY CHRISTOPHER: If you took a
8 picture of it, you'll see it.

9 MR. HAMILTON: If you took a picture. What
10 if you didn't take a picture?

11 HONORABLE TRACY CHRISTOPHER: Then it's just
12 whoever's name is first on the block. I mean, I think (2)
13 is totally unnecessary. I mean, it's just whoseever's name
14 is on the signature block.

15 HONORABLE SARAH DUNCAN: I think it is
16 necessary.

17 HONORABLE TRACY CHRISTOPHER: Whether it's
18 signed or not.

19 HONORABLE SARAH DUNCAN: I would rather Mike
20 be sanctioned and not me if he's the one that authorized
21 the filing of that brief.

22 HONORABLE TRACY CHRISTOPHER: Right, because
23 he signed it, just like the old rules. He signed it, his
24 name's there, he's the one responsible. If there's no
25 signature, it's the first person. That's the way the rule

1 should be written.

2 MS. PETERSON: So if no digitized
3 signature --

4 HONORABLE TRACY CHRISTOPHER: If it's blank
5 it's the first person in the list of however many people
6 are there.

7 HONORABLE SARAH DUNCAN: Well, what if
8 you've got two and you have to decide which one signed it?

9 HONORABLE TRACY CHRISTOPHER: Well, it's the
10 first person unless somebody physically signs it. You've
11 got to make sure number two signs it if you want number
12 two to be responsible.

13 HONORABLE SARAH DUNCAN: But not everybody
14 has a digital signature.

15 HONORABLE TRACY CHRISTOPHER: Digitized.
16 Physically signed it and scanned it.

17 CHAIRMAN BABCOCK: Justice Jennings.

18 HONORABLE TERRY JENNINGS: Am I missing
19 something? The whole point of this is to simplify this
20 matter. I mean, you can go out -- I can go onto Amazon
21 and enter, you know, my password and buy something and,
22 you know, four or five days later it comes in the mail.
23 Why do you have to have all these different entities this
24 has to pass through and these kinds of -- is this a
25 security measure or --

1 MS. PETERSON: Yeah, and because with the
2 transaction you're describing it's just you, whereas
3 here --

4 HONORABLE TERRY JENNINGS: Or I can, you
5 know, copy a document or attach a document to an e-mail
6 and send it to the court.

7 HONORABLE SARAH DUNCAN: But you can't
8 access Amazon's database of internal financial documents.
9 You can't add to it. But we're talking about --

10 HONORABLE TERRY JENNINGS: But you could
11 just e-mail a document --

12 THE REPORTER: Wait, wait, wait. Please
13 wait. Please wait.

14 HONORABLE TERRY JENNINGS: You could just
15 e-mail a document to a clerk and the clerk can --

16 HONORABLE SARAH DUNCAN: And we don't permit
17 that because we don't want the viruses in your e-mails.
18 You, a member of the public out there.

19 HONORABLE TOM LAWRENCE: We've got a system
20 set up partially by the Legislature, partially through
21 practice in the county and district and JP courts, and
22 there's a framework that we need to follow.

23 HONORABLE TERRY JENNINGS: Okay.

24 HONORABLE TOM LAWRENCE: I mean, that's the
25 best argument for not trying to reinvent the wheel or

1 change the mechanism, because we have got this mechanism
2 in place that really can't be changed, so we just need to
3 craft our rules to fit within that process.

4 MS. PETERSON: And that's part of what I ran
5 into in drafting, is there is this system in place, and I
6 think, though, the language that you suggested, Judge
7 Christopher, might be clearer if you just start off with
8 "if no digitized signature on the document" and then go
9 into it. I think that would be clearer, so I'll try to
10 redraft it that way to be clearer.

11 PROFESSOR DORSANEO: That word "controls"
12 does mean for sanctions purposes, hmm?

13 MR. STORIE: Yeah.

14 MS. PETERSON: Uh-huh.

15 PROFESSOR DORSANEO: Okay. I think that
16 needs to be made clearer.

17 CHAIRMAN BABCOCK: Okay. What about -- I'm
18 sorry. Elaine.

19 PROFESSOR CARLSON: Can I just ask a quick
20 question? So when you file electronically, you don't have
21 to have any handwritten signature?

22 MS. PETERSON: That's right.

23 PROFESSOR CARLSON: And if you don't, the
24 name that first appears is it, and that's always what it's
25 going to be unless there's a document that contains a --

1 MS. PETERSON: Digitized.

2 PROFESSOR CARLSON: -- copy of a signature,
3 which you're calling digitized, in which case the latter
4 controls.

5 MS. PETERSON: The digitized, yes.

6 PROFESSOR CARLSON: Okay.

7 PROFESSOR DORSANEO: I have one other
8 comment.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: It seems like quite an
11 odd place to have this information about sanctions right
12 here in the second paragraph.

13 MS. PETERSON: Well, it wasn't about
14 sanctions until you suggested that.

15 PROFESSOR DORSANEO: Well, that is what it's
16 about, isn't it?

17 MS. PETERSON: It was just about which
18 signature controls, but, I guess, yeah, if it is for
19 purposes of --

20 CHAIRMAN BABCOCK: Well, but that's a big
21 point about who gets sanctioned if something's wrong with
22 the pleading.

23 MR. HAWTHORNE: But it's also about notice,
24 too, though. It's also about who's going to get notice.

25 CHAIRMAN BABCOCK: Could you --

1 MR. HAWTHORNE: I'm sorry. Blake Hawthorne,
2 clerk of the Supreme Court.

3 CHAIRMAN BABCOCK: Thanks, Blake.

4 PROFESSOR DORSANEO: I would at least move
5 it down.

6 MS. PETERSON: Where would you put it?

7 PROFESSOR DORSANEO: Well, it doesn't strike
8 me that it's number two. You know, it may be number -- it
9 may be the last thing on the list here, but I really think
10 it needs to go in the -- you know, in the place where if
11 it's not already duplicated there, in the place where the
12 requirements of these rules are, signature requirements.

13 MR. DUGGINS: It should go in Rule 6, I
14 think.

15 MS. PETERSON: Rule 6 is about designating
16 lead counsel.

17 MR. DUGGINS: Well, it's also service and
18 6.3 and --

19 MR. MUNZINGER: Is there an analog to Rule
20 13 in the appellate rules? Rule 13 being if you signed
21 it, it better be true or we're going to sanction you and
22 do bad things to you.

23 PROFESSOR DORSANEO: Where is it?

24 MR. MUNZINGER: If there is an analog,
25 that's a logical place to put at least part of it.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. MUNZINGER: At the same time it probably
3 also belongs in the signature section as well, but to make
4 it clear to people who are subject to sanctions that if
5 your name is the lead name on the signature block, you're
6 going to be the guy we look to unless there is a digitized
7 signature on the paper.

8 CHAIRMAN BABCOCK: Sarah, is there a
9 sanction rule in the TRAP rules?

10 HONORABLE SARAH DUNCAN: Only for original
11 proceedings. Oh, no, it's for everything.

12 PROFESSOR DORSANEO: There's not one that
13 would look like 13.

14 HONORABLE SARAH DUNCAN: It doesn't look
15 like 13.

16 PROFESSOR DORSANEO: There isn't one, I
17 don't think, that I would know.

18 HONORABLE DAVID GAULTNEY: There's Rule 45,
19 but that's just frivolous appeals, and I don't think there
20 is an equivalent on that. Obviously it's our inherent
21 power, but I think it belongs under Rule 6. That's where
22 you're signing. Blake points out that there's a -- one of
23 the provisions for the signature is to know who to serve,
24 and you're defining what constitutes the signature, right?

25 MS. PETERSON: Uh-huh.

1 CHAIRMAN BABCOCK: Yeah, Carl.

2 MR. HAMILTON: What do we mean by signature
3 block? If it's Jackson Walker, are you talking about
4 where it says all the names of the lawyers, and then if
5 the first person on there happens to be deceased then he's
6 going to be get all the notices?

7 CHAIRMAN BABCOCK: You're talking about our
8 firm now, aren't you? All our dead guys filing stuff.

9 MR. HAMILTON: Yeah.

10 CHAIRMAN BABCOCK: I think under your
11 hypothetical you would.

12 MR. HAMILTON: That's right, if that's what
13 you mean by the first name on the signature block.

14 MS. PETERSON: Well, it's the first name of
15 the party that's filing the document. I mean, it's not
16 going to be the firm name. It's not going to be the name
17 of the firm. It's going to be the name of the attorney.

18 CHAIRMAN BABCOCK: The first attorney.

19 MS. PETERSON: The first attorney.

20 MR. LOW: Sometimes the firm will have three
21 different lawyers --

22 CHAIRMAN BABCOCK: Right.

23 MR. LOW: -- on the case, and the first one,
24 so you've got it centered, so that's the signature block,
25 will be the first name that appears.

1 PROFESSOR DORSANEO: Even if somebody down
2 the list signs, which frequently happens.

3 MS. PETERSON: Well, if somebody down the
4 list signs and it's a photo, you're going to see a scanned
5 image, then that's going to control.

6 MR. LOW: Yeah.

7 MS. PETERSON: But in the absence of that
8 it's going to be the first person named on the signature
9 block.

10 MR. LOW: No matter who files the later one,
11 the one that files the first pleading, the first
12 signature, that is lead counsel until it's redesignated.
13 And the others can file something, but he's still lead
14 counsel.

15 CHAIRMAN BABCOCK: Right. Okay. I know as
16 much as you hate this, hate to stop, let's take our
17 afternoon break.

18 (Recess from 3:34 p.m. to 3:50 p.m.)

19 CHAIRMAN BABCOCK: Kennon, where did we
20 leave off? We're back on the record.

21 MS. PETERSON: We left off, we were at
22 9.1(c)(2), and we were talking about moving and going with
23 about the signature controlling to a different part of the
24 rules.

25 CHAIRMAN BABCOCK: Okay. Everybody want to

1 do that or not?

2 MS. PETERSON: Looks like they're okay with
3 keeping it where it is.

4 CHAIRMAN BABCOCK: Yeah, looks like we'll
5 keep it where it is.

6 Okay. Justice Bland, your thoughts on that?

7 HONORABLE JANE BLAND: Yes, sir. My
8 thoughts on?

9 HONORABLE TRACY CHRISTOPHER: Starting back
10 up? Good idea.

11 MR. MEADOWS: She wants anonymity.

12 CHAIRMAN BABCOCK: See, you weren't paying
13 attention.

14 HONORABLE TRACY CHRISTOPHER: Where's my
15 realtime?

16 HONORABLE JANE BLAND: I was absolutely
17 paying attention, and so far I didn't find anything that
18 sparks my disagreement.

19 CHAIRMAN BABCOCK: Okay, there you go.

20 MS. PETERSON: I thought you were going to
21 say "interest."

22 HONORABLE JANE BLAND: You should be happy
23 about that.

24 CHAIRMAN BABCOCK: All right. We're talking
25 about 9.1(c)(2), and we've had a big discussion about it.

1 Anything else? Yeah, Richard.

2 MR. MUNZINGER: In 9.1(c)(4).

3 CHAIRMAN BABCOCK: Yes, sir.

4 MR. MUNZINGER: An electronically filed
5 document that must be notarized, sworn to, et cetera, must
6 have a resolution of 300 dots per inch, is that the
7 standard that we were talking about earlier?

8 MS. PETERSON: Yes.

9 CHAIRMAN BABCOCK: It was.

10 MR. MUNZINGER: Is that standard limited
11 only to documents that are scanned like this, or does that
12 requirement apply to all documents? The 300 dots per
13 inch.

14 MS. PETERSON: Just documents that are
15 scanned.

16 MR. HERMES: Right, the assumption is that
17 they would otherwise be text documents as opposed to
18 images.

19 MR. MUNZINGER: Would otherwise be what?

20 MR. HERMES: Text.

21 MR. MUNZINGER: Text, t-e-x-t?

22 MR. HERMES: Right.

23 HONORABLE TOM LAWRENCE: Like a Word
24 document or WordPerfect.

25 MR. MUNZINGER: Yeah. The problem I have

1 with this is, is that if it is setting a standard, on its
2 face it's limited to documents that must be notarized,
3 sworn to, or made under oath, as opposed to other digital
4 -- digitized, whatever it is, scanned documents, so the
5 standard itself is limited. It shouldn't be so limited.
6 It ought to be broader.

7 CHAIRMAN BABCOCK: Is that right or not?
8 Because it's the scanned documents that give the problem
9 qualitywise, right?

10 MR. GRIFFITH: (Nods head.)

11 CHAIRMAN BABCOCK: And the other documents
12 don't create quality problems.

13 MR. MUNZINGER: Well, I understand. So I've
14 tried a lawsuit. I now have an obligation to file an
15 electronic record. The court reporter has a record.
16 Let's pretend for a moment that I'm going to make an
17 attachment of something like that to my brief, and I file
18 it, and it's a scanned document, but it is not a document
19 that must be sworn to, et cetera.

20 CHAIRMAN BABCOCK: Right.

21 MR. MUNZINGER: Nor is it some document
22 described in No. (5) below either. My point is, should
23 there not be somewhere a general rule that anything
24 scanned --

25 MS. PETERSON: Scanned has to be at that.

1 MR. MUNZINGER: -- has to be 300 dots per
2 inch.

3 MS. PETERSON: I think so.

4 MR. MUNZINGER: If that's the case, these
5 don't do it.

6 CHAIRMAN BABCOCK: Yeah, I think you're
7 right. I think you're right about that.

8 MR. HARDIN: God, that was easy.

9 MR. MUNZINGER: I'm sweating.

10 CHAIRMAN BABCOCK: And we don't even have to
11 take a vote about that. Alex.

12 MR. HARDIN: And it happened at five minutes
13 to 4:00.

14 PROFESSOR ALBRIGHT: Should it be "at least
15 300 dots per inch" instead of --

16 MS. PETERSON: I think Bruce was saying
17 higher resolution result in --

18 MR. HERMES: Higher resolution would be
19 better, but there are tradeoffs you make, and they come in
20 storage.

21 PROFESSOR ALBRIGHT: So if I have a scanner
22 that scans at higher resolution then you-all reject it?

23 MR. HERMES: We probably wouldn't even
24 detect it, to be honest, but it can -- if a scanner is
25 able to do higher then it can be -- it can be dumbed down

1 to 300.

2 PROFESSOR ALBRIGHT: That's assuming I know
3 how to do that.

4 CHAIRMAN BABCOCK: Dumb and dumber.

5 MS. PETERSON: I think that's a question I
6 asked, too, and I think storage concerns were the only --

7 MR. HERMES: Yeah, I mentioned earlier that
8 as you increase that number it increases the size of the
9 document geometrically.

10 MS. PETERSON: So I have a note to include a
11 provision that all scanned documents --

12 CHAIRMAN BABCOCK: Right.

13 MS. PETERSON: -- have to be at 300 DPI.

14 CHAIRMAN BABCOCK: Right. Richard.

15 MR. MUNZINGER: Can I go to 9.2(2)?

16 CHAIRMAN BABCOCK: I think that would be
17 helpful.

18 MR. MUNZINGER: "A document is
19 electronically filed in an appellate court by
20 electronically transmitting the document to an approved
21 EFSP." So the date and time of filing is the time that it
22 is received by the EFSP as distinct from the time that the
23 EFSP sends it to TexasOnline?

24 MS. PETERSON: Yes. That's right. When you
25 send it to EFSP.

1 CHAIRMAN BABCOCK: Okay. Bill.

2 PROFESSOR DORSANEO: Do we have to use
3 "EFSP"? Can't we say --

4 MS. PETERSON: You want me to spell it out
5 every time?

6 PROFESSOR DORSANEO: -- four extra words?

7 MS. PETERSON: I can spell it out every
8 time, if you want.

9 CHAIRMAN BABCOCK: Or we could give it a pet
10 name.

11 MR. MUNZINGER: How about ESOB? Electronic
12 son of a gun.

13 HONORABLE SARAH DUNCAN: I would rather have
14 the acronym.

15 CHAIRMAN BABCOCK: Yeah, Levi.

16 HONORABLE LEVI BENTON: No, no.

17 CHAIRMAN BABCOCK: Just scratch it, okay.
18 Anybody else on 9.2?

19 HONORABLE TRACY CHRISTOPHER: Yes.
20 Everything on 9.2?

21 CHAIRMAN BABCOCK: Well, 9.2(a)(2) I guess
22 is where we were. Anything else on 9.2(a)(2)?

23 Okay. 9.2(c).

24 MS. PETERSON: Now, this is the provision
25 that used to address electronic filing just with a

1 sentence, "A court of appeals may by local rule permit
2 documents to be filed, signed or verified by electronic
3 means," and this is where a lot of the mechanics of
4 e-filing have been placed. It seemed like the most
5 logical location. The first sentence is just enabling it,
6 making it clear. This is going to be have to be changed
7 consistent with the vote. If we're going to require --
8 mandate e-filing then this language will have to be
9 modified to reflect that, so I'll put a note.

10 CHAIRMAN BABCOCK: And we have already taken
11 those votes.

12 MS. PETERSON: Uh-huh. And then the second
13 sentence in here is just generally if you're going to
14 electronically file any document, that you're agreeing to
15 update information about any changes in your e-mail
16 address within 24 hours of the change, and that comes from
17 the JP rules as well.

18 And then the third sentence relates to what
19 we were talking about earlier. The electronically filed
20 document as maintained by the clerk will be he deemed to
21 be the original document, and this is for purposes of
22 archiving and recordkeeping and whatnot, and, Blake, I
23 don't know if you want to touch on just briefly the bill
24 that's been filed that contains this language.

25 MR. HAWTHORNE: I'm sorry, you caught me

1 texting someone.

2 MS. PETERSON: Oh, sorry. The
3 "electronically filed as maintained by the clerk will be
4 deemed to be the original document."

5 MR. HAWTHORNE: Right, so there is a bill
6 pending both in the House and the Senate that would make
7 it clear that clerks can store documents electronically
8 for archives purposes, and it makes it clear that the
9 electronic document maintained by the clerk is the
10 original, and the reason that we wanted to do that is
11 because there are some things that happen to the document,
12 some metadata that is added to the document, and there may
13 be some clean up that we might do to some scanned
14 documents, we have the ability to do that, so we just
15 wanted to make it clear that whatever electronic document
16 that the clerks maintain is the original.

17 HONORABLE TOM GRAY: And that the paper can
18 be destroyed.

19 MR. HAWTHORNE: And the paper can be
20 destroyed. That's correct.

21 MS. PETERSON: And my understanding is that
22 the archivists don't believe a statutory amendment was
23 necessary to allow paper documents to be destroyed and
24 electronic documents to be what goes over for archiving
25 purposes, but the Court of Criminal Appeals amended the

1 statute in the Government Code. I can't really recall the
2 exact section number, but they amended the statute not too
3 long ago to make it clear that you can get rid of paper,
4 and in light of that statute -- you're aware of all of
5 this, I know, but in light of that statute being on the
6 books there was a feeling that the Supreme Court and
7 courts of appeals should also have statutory language
8 making it clear that you don't have to keep the paper.

9 MR. HAWTHORNE: That's right. So all of our
10 appellate court clerks, including the clerk of the Court
11 of Criminal Appeals, would have the same statute, and same
12 statute would apply to all of them. The same rules would
13 apply to all of them.

14 MS. PETERSON: I can't remember the bill
15 numbers.

16 MR. HAWTHORNE: Senate Bill 1259, if you're
17 curious.

18 MS. PETERSON: 1259.

19 CHAIRMAN BABCOCK: Okay. Elaine.

20 PROFESSOR CARLSON: Blake, can I ask a
21 technically ignorant question? What happens when the
22 technology changes? Remember microfiche and floppy disks
23 and all that? How does the -- what's the plan to stream
24 this electronic storage forever into time?

25 MR. HAWTHORNE: I'm glad you asked that. I

1 have been talking to Bruce and the OCA about making it
2 clear, perhaps somewhere in one of our appendices, that
3 OCA has a continuing obligation to migrate this data to
4 whatever the current format is. I think that that would
5 be a wise thing to do, because I think, as I discussed
6 with Bruce, I think 20 years from now when PDF is no
7 longer dominating the market and Bruce and I are not here
8 anymore that someone is going to be stuck with that
9 problem. So I think we do need to do something about it
10 to make it clear that that responsibility lies with the
11 Office of Court Administration, at least for appellate
12 courts.

13 CHAIRMAN BABCOCK: Justice Gray.

14 HONORABLE TOM GRAY: That's been the issue,
15 and that's the reason the archivists didn't think the
16 statute was necessary. We've always been able to do this,
17 but just because of that very question that when we redid
18 our document retention schedules at the Tenth Court about
19 eight years ago, we specifically did not use the
20 electronic form of any document for the archival record of
21 the document because in the regs from the archivists under
22 the Texas Library or whatever it is, management of the
23 archives, the custodian of the archived document, which is
24 going to be the electronic version here, has to be able to
25 annually test a certain number of those documents to be

1 sure that they are -- can be retrieved, guarantee
2 migration to new software and hardware platforms to make
3 sure that that document is always recoverable.

4 Because even within our court where we have
5 maintained files of our opinions, those were originally
6 made, for example, in WordPerfect I think 2 or 3, and once
7 we passed WordPerfect 7 we could no longer open them, so
8 we had to keep an old version of Word -- WordPerfect, and
9 now we do everything in Word, and so, you know, you put
10 your finger on the problem of keeping files
11 electronically, and Blake's right. Somebody -- because
12 the reason we have resisted this as individual courts of
13 appeal is we do not have the in-house technology, the
14 person that is capable of guaranteeing and maintaining the
15 migration, and the only way we're going to give it up to
16 OCA is if Bruce or somebody over there statutorily or by
17 regulation accepts that responsibility and takes it off of
18 us.

19 PROFESSOR CARLSON: Thanks.

20 HONORABLE TOM GRAY: Excellent question.

21 MR. HAWTHORNE: One more quick point on
22 that. The archivists will tell you, too, that the only
23 truly proven archive solutions are paper and microfilm, so
24 the statute does make it clear that we can put these
25 records on microfilm. If we had the money for that it

1 would be very quick to be able to print these documents to
2 microfilm and store them that way. We're told that
3 microfilm will last for about 500 years if it's stored
4 properly, and we can -- you don't have the technology
5 issues of the technology migrating to something else
6 because it's film, and you should always be able to read
7 it.

8 MR. HERMES: And I suppose they have a few
9 500 year-old microfilms to prove it.

10 MR. HAWTHORNE: Right.

11 CHAIRMAN BABCOCK: Okay. Bill.

12 PROFESSOR DORSANEO: I'm just wondering
13 whether this "by electronically filing a document"
14 language in the introductory part of (c), I wonder, should
15 it -- that seems to be talking about what's going to
16 happen in (8) or (9), right? E-mailing a confirmation or
17 e-mailing an alert that the appellate court rejected the
18 document, is that what that's about? Is that why the
19 e-mail? Is that what the e-mail address is used for? If
20 that's so, I think it would maybe be a good idea to take
21 that language and give it a separate --

22 MS. PETERSON: Separate subdivision?

23 PROFESSOR DORSANEO: And maybe make it (10).

24 MS. PETERSON: Okay. Yes. That makes
25 sense.

1 PROFESSOR DORSANEO: If not -- and then my
2 second question on that is, is that the best trigger, by
3 electronically filing a document in an appellate court?

4 MS. PETERSON: Well, I'm reading it again,
5 and I'm wondering whether it would be better to say "by
6 registering with TexasOnline."

7 PROFESSOR DORSANEO: That's what I thought.
8 If people registered with TexasOnline it makes sense that
9 they would --

10 CHAIRMAN BABCOCK: Right.

11 MS. PETERSON: Yeah.

12 CHAIRMAN BABCOCK: Yeah, good point.

13 MS. PETERSON: Especially because you have
14 different parties filing on behalf -- different person may
15 file on behalf of this other person, so maybe I'm not
16 electronically filing, and I've delegated it out for
17 years, but I still need to be required to update my e-mail
18 address for purposes of notification. So maybe change
19 this to "by registering with TexasOnline" and move it to a
20 separate subdivision.

21 MR. HERMES: Well, their actual filing would
22 follow the registration and would presumably be later
23 information, more current.

24 MS. PETERSON: But it doesn't matter,
25 because if you're saying "by registering with TexasOnline"

1 it's not like --

2 MR. HERMES: Oh, I see.

3 MS. PETERSON: If that's what triggers the
4 obligation to update within 24 hours of any change in the
5 e-mail address.

6 PROFESSOR DORSANEO: Does it even need a
7 trigger? I mean, don't you have to give the e-mail when
8 you register?

9 MS. PETERSON: You have to give it, but then
10 if something changes we have to put something in the rules
11 to put parties on the line for updating their e-mail
12 address because that's going to be the way of
13 communication now. So I think you need something in there
14 about updating the e-mail address.

15 PROFESSOR DORSANEO: Well, I agree with
16 that. But say "a party must provide information regarding
17 any change in" --

18 MS. PETERSON: Just say it out?

19 PROFESSOR DORSANEO: -- "the party's e-mail
20 address to TexasOnline, the appellate court, and all
21 other," and just period.

22 MS. PETERSON: Okay.

23 MR. GILSTRAP: Chip?

24 CHAIRMAN BABCOCK: Yes, sir.

25 MR. GILSTRAP: How about 9.2(c)(4)?

1 HONORABLE TRACY CHRISTOPHER: Wait, wait,
2 wait. (c) (2), (c) (1).

3 CHAIRMAN BABCOCK: Have we exhausted the
4 discussion on 9.2(c), the introductory part?

5 MS. PETERSON: If nobody objects I'll just
6 make those changes, bump it into a separate section, and
7 think about the wording, either hinge it on registration
8 or say you have to do it, period.

9 CHAIRMAN BABCOCK: Right.

10 MS. PETERSON: Figure that out.

11 CHAIRMAN BABCOCK: In 9.2(c) (1) should it be
12 "and electronically"?

13 MS. PETERSON: Yeah, there's a typo there,
14 and this is an area where maybe we want to put the PDF
15 requirement just in the rules instead of referring --

16 HONORABLE TRACY CHRISTOPHER: Well, the way
17 Mike explained it to me, the PDF requirement, that's all
18 they say, but then they tell the service providers how to
19 convert the document.

20 MS. PETERSON: Uh-huh.

21 HONORABLE TRACY CHRISTOPHER: But if a
22 lawyer sends it already in a PDF to the service provider,
23 then the service provider doesn't reconvert it, so if the
24 lawyer doesn't convert it properly to a PDF in a good
25 format, it can blur the document.

1 MS. PETERSON: And then it stays blurred
2 throughout.

3 HONORABLE TRACY CHRISTOPHER: And then it
4 stays blurred all the way up. So --

5 MS. PETERSON: And here I wonder, too --

6 HONORABLE TRACY CHRISTOPHER: -- the lawyer
7 needs to know what the requirements there to keep the
8 document looking good.

9 MS. PETERSON: And do you think we need a --

10 HONORABLE TRACY CHRISTOPHER: Whatever it
11 is.

12 MS. PETERSON: What's that?

13 HONORABLE TRACY CHRISTOPHER: I said
14 whatever it is. I don't know what it is.

15 MS. PETERSON: Well, I think we can use the
16 language that's used in Appendix C about scanned images,
17 but I wonder beyond that, when the question was asked
18 earlier, what is -- did JCIT set a standard, and if so,
19 what is it, and the only answer was PDF. So my question
20 is whether we even need a provision referring to some
21 standard set by the Supreme Court or Court of Criminal
22 Appeals if all it's going to be is the PDF must be -- you
23 know, if you're going to submit a scanned image, it has to
24 be submitted in black and white, 300 DPI, and that's all
25 that needs to be in the rules as opposed to this language

1 referring to some floating standard out somewhere.

2 MR. HERMES: Well, we went into -- in our
3 drafting of the UFM we went into a little more specificity
4 with that and included the text requirement.

5 MS. PETERSON: You mean searchable
6 requirement?

7 MR. HERMES: Yes. Yes.

8 MS. PETERSON: Fully searchable PDF?

9 MR. HERMES: Right. Which is going to
10 entail a clearer, more readable document.

11 MS. PETERSON: So maybe what we need is the
12 definition of PDF that's contained in the appendices, one,
13 and we need a minimum resolution as the second thing, a
14 300 DPI.

15 CHAIRMAN BABCOCK: Is that going to fix
16 Judge Christopher's problem?

17 HONORABLE TRACY CHRISTOPHER: I don't know.
18 Because I don't know enough about --

19 CHAIRMAN BABCOCK: Yeah, and I'm sitting
20 here wondering how do the practitioners who are filing
21 stuff know all of this? Because I certainly don't know
22 it. Do you know this?

23 MS. SENNEFF: About the -- no.

24 HONORABLE TRACY CHRISTOPHER: Because, I
25 mean, the way I understand it, like I have a pretty

1 sophisticated computer, and I can convert it easily to
2 a PDF, and it just makes a separate PDF document of it,
3 and it's really clear, but I don't know if it's 300 dots
4 or whatever it is, but it's a very clear picture, but
5 people who don't have that built into their computer
6 will -- can actually like download software that converts
7 a Word document or a WordPerfect document into a PDF, and
8 I would assume that the quality of that software varies
9 and the quality of your PDF varies based upon that. I
10 mean, so I don't know --

11 MS. PETERSON: Is that accurate?

12 HONORABLE TRACY CHRISTOPHER: -- what it has
13 to be, but just saying a PDF is --

14 MR. HERMES: It's not enough.

15 HONORABLE TRACY CHRISTOPHER: -- not enough.

16 CHAIRMAN BABCOCK: Judge Lawrence.

17 HONORABLE TOM LAWRENCE: Well, since this is
18 a consistent problem for JP up to appellate, why can't
19 JCIT just adopt a standard of 300 DPI for all of these
20 types of documents? Wouldn't that resolve it?

21 MR. HERMES: No. I mean JCIT can do that,
22 but they don't have the voice of authority that this does.

23 HONORABLE TOM LAWRENCE: Well, then how
24 could it be done on the technical side? Can Bearing Point
25 do it or how can that be done?

1 MR. GRIFFITH: Yes. Technically between us,
2 between Bearing Point, TexasOnline, and the service
3 providers, we can enforce a standard, a PDF standard. I
4 think you probably don't want that written into the rules
5 necessarily because it's just like with the archiving
6 documents. That standard is going to progress over time,
7 but if we set it at 300 DPI or whatever the committee
8 determines is legible then we can enforce that.

9 HONORABLE TOM LAWRENCE: Well, who can tell
10 you to do that?

11 MR. GRIFFITH: JCIT has -- has the authority
12 to set the standard. It's just they don't have the
13 enforcement.

14 HONORABLE TOM LAWRENCE: Okay. But it can
15 be done, and that would solve the problem not only for --
16 well, it would solve the problem for all of the e-filings.
17 Right?

18 MR. GRIFFITH: Yeah.

19 HONORABLE TOM LAWRENCE: Wouldn't that
20 resolve it?

21 MR. GRIFFITH: It would. Yes.

22 CHAIRMAN BABCOCK: Are you suggesting we
23 take this 300 DPI thing out of 9.1?

24 MR. GRIFFITH: No. I think because there
25 you're talking about scanned images.

1 CHAIRMAN BABCOCK: Right.

2 MR. GRIFFITH: Which is really a separate
3 issue from conversion. We actually need both.

4 MS. PETERSON: Is it accurate that if you
5 are converting from Word or WordPerfect to a PDF that you
6 may or may not get a clear image as a result?

7 MR. GRIFFITH: That's correct, depending
8 on if you're using -- if you use an Adobe standard, it
9 changes, and you're going to get a good conversion. If
10 you use some third party almost-PDF standard then it could
11 be illegible.

12 MR. HERMES: Some of those actually take the
13 Word or WordPerfect file and kind of make a snapshot of it
14 and make that into a nonsearchable PDF form.

15 MS. PETERSON: As if I put it on the printer
16 and scanned it. It would have the same effect.

17 MR. HERMES: Yeah, basically that, although
18 it would be perfectly horizontal rows and so forth. It
19 would have some advantages, probably be better than --

20 MS. PETERSON: Well, is there a way to
21 explain this to practitioners so that they can understand
22 it? Because I agree with you that if I saw I have to
23 submit it, it's fully searchable 300 DPI, and pursuant to
24 some standard that I never heard of before for PDFs, I
25 wouldn't know -- I wouldn't know what to do. I would call

1 somebody for help. So if there are --

2 MR. MUNZINGER: You would call on me.

3 MR. HERMES: I mean, wherever you put some
4 language, whether it's a JCIT rule, a TRAP, or some other
5 places, someone's not going to understand it.

6 MS. PETERSON: My question is whether
7 there's a way to say this --

8 MR. HERMES: Yeah.

9 MR. GRIFFITH: Well, I think if you put it
10 in the rules just in those terms, that it's searchable,
11 300 DPI, then that gives us something we can enforce on
12 the technical side as it's in the process. So we won't
13 let the attorney upload it if it doesn't meet that
14 standard.

15 MS. PETERSON: Maybe a comment could have
16 instructions for --

17 CHAIRMAN BABCOCK: Comments, "Go to here if
18 you want to figure this out."

19 MR. GILSTRAP: Where does it say it should
20 be searchable?

21 MS. PETERSON: It doesn't say that now, but
22 the option on the table is for 9.2(c)(1) rather than
23 referring to standards set by the Supreme Court and Court
24 of Criminal Appeals, it would just contain the standard
25 for any scanned document it has to be fully searchable,

1 300 DPI resolution, and the PDF. Bruce, I don't remember
2 what it's called, but it's like a definition of PDF.

3 MR. HERMES: Yeah, it's a International
4 Standards Organization standard.

5 CHAIRMAN BABCOCK: Alex.

6 PROFESSOR ALBRIGHT: I'd like to talk on the
7 other side of that. I would prefer to have a standard
8 approved elsewhere because I think technology changes so
9 quickly 300 DPI PDF in five years may be ridiculous, and
10 everybody is really using something else.

11 MS. PETERSON: So if we did it by order --

12 PROFESSOR ALBRIGHT: Then we don't need to
13 have this meeting about those standards every time we
14 change the rules.

15 CHAIRMAN BABCOCK: Justice Bland.

16 PROFESSOR ALBRIGHT: And also, we've been
17 talking about here, it seems like these rules have a lot
18 of technical things that don't really seem very rule-like
19 but more specification-like. Like (2) and (3).

20 MS. PETERSON: Uh-huh.

21 PROFESSOR ALBRIGHT: Why does there have to
22 be a rule that the EFSP and TexasOnline are open 24/7?
23 That just doesn't seem like a rule.

24 MS. PETERSON: Yeah, it may not be
25 appropriate for a rule. It's in there because it's a rule

1 in the JP context --

2 PROFESSOR ALBRIGHT: Right.

3 MS. PETERSON: -- and also to give people
4 comfort knowing these places are going to be open and I
5 can file this document.

6 PROFESSOR ALBRIGHT: But courthouses aren't
7 open 24/7.

8 HONORABLE TOM LAWRENCE: But that's not
9 important. It's if they're open then it's going to be
10 date stamped when it's filed with them, and that's the
11 critical thing.

12 CHAIRMAN BABCOCK: Justice Bland.

13 PROFESSOR ALBRIGHT: But, I mean, I think
14 that's one of the -- that's your deal with your EFSP, is
15 you say I'm going to only have -- I'm going to only do
16 business with one that's open 24/7. I'm not going to do
17 business with one that's only open 8:00 to 5:00 Monday
18 through Friday.

19 It's just when you get this technical in the
20 rules then as the technology changes you have to change
21 the rule, and we're still stuck with a rule that says fax
22 filing requires three days, add three days to the fax
23 filing, so I don't think we adapt real quickly to
24 technology changes.

25 MS. PETERSON: I would like a vote on that,

1 because this came up at the task force level. There are
2 some people who want it spelled out in the rules so that
3 they know exactly what's going to happen, and I believe --
4 correct me if I'm wrong, Mike -- that Bearing Point also
5 likes it spelled out in the rules so that it's really
6 clear what's going to happen, and maybe Bearing Point
7 would be just as happy with an order. I don't know, but
8 there have been people who have expressed a preference for
9 having this language in the rules, even though I agree
10 it's not something you would typically see in the rule.

11 CHAIRMAN BABCOCK: So what -- I'm sorry,
12 Justice Bland has had her hand up for a long time.

13 HONORABLE JANE BLAND: Well, I agree with
14 Professor Albright, and you said, well, we could write a
15 rule that would require the 300 and fully searchable text.
16 Well, I'm not convinced that you have a fully
17 searchable PDF software that's routinely available to
18 lawyers and is secure so that it couldn't be tampered with
19 and those kinds of things, and those are just technical
20 issues that are beyond the scope of any of our abilities,
21 and so the whole idea that we're going to write a rule
22 that we don't even really know if anybody can comply with
23 and what costs might be associated with complying with it,
24 makes me, you know, a little apprehensive.

25 I think it would be better if we let the

1 technical people come up with a technical framework that
2 says, yeah, these are the minimum specifications that will
3 meet the readability requirements that the judges are
4 interested in having and the searchability requirements,
5 if we can even get those, which I was under the
6 understanding that we couldn't, and still have it PDF and
7 have it be secure, but maybe we can now, and that sort of
8 thing it seems to me ought to go off to the technology
9 folks, and they can publish the schedule of the
10 requirements, and, you know, routinely the Texas Supreme
11 Court could adopt it in a miscellaneous docket order.

12 MS. PETERSON: My concern, and maybe it's
13 I'm worrying too much, but I feel like --

14 HONORABLE JANE BLAND: That's what this
15 committee is all about.

16 MS. PETERSON: Or maybe I belong.

17 HONORABLE JANE BLAND: You fit right in.
18 That's exactly what you're supposed to do is worry about
19 these things.

20 MS. PETERSON: Well, my concern is if a
21 person picks up the rules and they read this and they're,
22 like, okay, "Pursuant to standards approved by the Supreme
23 Court, where do I go to find that?" And if I have to
24 comply and do something a certain way, I mean, I'd like
25 for it to be to the extent possible in one set of rules so

1 that I don't have to go read this and then go read the
2 miscellaneous docket and then read the appendices. You
3 know what I mean? My concern is just does it make it
4 harder.

5 CHAIRMAN BABCOCK: Just for comparison, the
6 Fifth Circuit I know has rules about font size, margins.

7 HONORABLE JANE BLAND: Well, we do, too.

8 CHAIRMAN BABCOCK: Yeah, and that's right.
9 So where are those?

10 HONORABLE JANE BLAND: They're in here.

11 CHAIRMAN BABCOCK: They're in the TRAP
12 rules.

13 HONORABLE SARAH DUNCAN: And that's my
14 response to -- I rarely disagree with Alex, but on this
15 one I'm just going to have to disagree. It is a lot more
16 trouble to find this in --

17 CHAIRMAN BABCOCK: You guys take it outside

18 HONORABLE SARAH DUNCAN: -- the
19 miscellaneous docket orders, and it's -- if we're going to
20 take the electronic filing parameters and rules out of the
21 TRAP rule then I think we ought to take out the font size
22 and the paper size, that it needs to be white paper and
23 has to lie flat when open. These technical things are
24 what we live for, and to be able to just, you know, say to
25 my assistant, Bruce, "We've got new electronic filing

1 rule, here's a redlined copy, become familiar with those,"
2 instead of having to go find the order and distribute the
3 order and --

4 HONORABLE TOM GRAY: But why couldn't we
5 just hyperlink the order?

6 CHAIRMAN BABCOCK: All right. You're out of
7 order. Judge Christopher.

8 HONORABLE TRACY CHRISTOPHER: Well, I've
9 never liked these rules, and so the --

10 MS. PETERSON: So we're starting behind.

11 HONORABLE TRACY CHRISTOPHER: -- idea that
12 we are keeping them alive because the local rules are like
13 this, the JP rules are like this, and now we're going to
14 keep them again in the TRAP rules. They're not
15 well-written.

16 CHAIRMAN BABCOCK: Hey.

17 HONORABLE TRACY CHRISTOPHER: I'm sorry.

18 CHAIRMAN BABCOCK: Judge Lawrence.

19 HONORABLE TRACY CHRISTOPHER: But he took
20 them from the local rules that have been --

21 HONORABLE TOM LAWRENCE: No, I took them
22 from the county and district e-filing rules.

23 HONORABLE TRACY CHRISTOPHER: Right. Yeah,
24 that's what I'm talking about, our local rules, which came
25 from TexasOnline and Bearing Point, and we were told you

1 must adopt these rules in order to have e-filing in your
2 county, so we did, and the Supreme Court approved it, and
3 so they were given to us by computer people and include a
4 lot of unnecessary things that don't need to belong in a
5 rule of procedure, like where the document goes from here
6 to here to here. That just doesn't belong in a rule of
7 procedure.

8 CHAIRMAN BABCOCK: Justice Bland, and then
9 Judge Lawrence will have a chance for rebuttal.

10 HONORABLE JANE BLAND: Well --

11 HONORABLE TRACY CHRISTOPHER: He knows what
12 I mean.

13 HONORABLE JANE BLAND: As far as the font
14 size and margin size works to a point, but everybody --
15 those things are staying constant; whereas, you know, the
16 digital printer size or the ink used and what these PDFs
17 can do and the security level that's required for them,
18 they're ever changing and they're not changing, you know,
19 every five years or even every year. You know, how often
20 is your Adobe Acrobat Reader updated? Three times, four
21 times a year maybe? And that's what reads PDF, and, you
22 know, so I sit there and say to myself it's one thing to
23 put something in like font size that is a standard that
24 hasn't really changed since they started talking about
25 font size. It's another thing to say, well, here are the

1 computer requirements, and, you know, obviously the
2 computer requirements of 10 years ago look nothing like
3 the computer requirements of today. We had floppy disks,
4 so we didn't -- you know, so -- and so to say that we need
5 this, you know, certainty of what the requirements are,
6 isn't that TexasOnline's job to publish what those
7 requirements are and when somebody tries to file their
8 document it's rejected because it didn't meet -- and tell
9 them what requirement they didn't meet?

10 I mean, why would that be a rule job? That
11 would be a computer -- that's what you're paying this
12 money for to have TexasOnline, you know, file your
13 document and have this electronic service provider get it
14 ready for you, and they are the ones that ought to be, you
15 know, involved in setting up these standards and then
16 flyspecking it to see that people comply with them, and
17 then they ought to be the ones educating people about why
18 their stuff is not in compliance. Not the TRAPs. The
19 TRAPs are for law.

20 CHAIRMAN BABCOCK: So you would take the --

21 HONORABLE JANE BLAND: Law for computers.

22 CHAIRMAN BABCOCK: You would take the
23 300 DPI out of the rule.

24 HONORABLE JANE BLAND: Well, I don't know
25 that 300 DPI -- I mean, we're using that because we think

1 that's what is the appropriate thing that will give us
2 readability on these documents.

3 MS. PETERSON: That's what the people at OCA
4 have identified as the readability level, and I mean --

5 HONORABLE JANE BLAND: Right, but we're
6 talking about searchability and other things like that,
7 and I'm sure there are other aspects of what you need for
8 an electronic file to get filed. You probably couldn't
9 have used the computer, you know, that you had five or six
10 years ago. You probably need some, you know, sort of -

11 CHAIRMAN BABCOCK: R. H., then Richard, and
12 then Judge Christopher.

13 HONORABLE TOM LAWRENCE: What happened to
14 me?

15 CHAIRMAN BABCOCK: Oh, I'm sorry. Judge
16 Lawrence. Well, you know.

17 HONORABLE TOM LAWRENCE: When the -- when we
18 did the JP task force we were fortunate to have OCA people
19 and Bearing Point and people that were on the county and
20 district court task force when they did that, and this all
21 came up, and one of the problems with the current e-filing
22 rules is that they are not easy to find. They are in the
23 JCIT rules. So a lawyer who is trying to find something
24 who would normally go to the Rules of Procedure has to go
25 find the JCIT rules, which are not easy to find, so I

1 think they're attempting now to put these in the TRAP
2 rules where everybody would find all of the filing stuff,
3 which was perceived to be an improvement.

4 And to suggest that, well, we put some of
5 the rules in the TRAP rules and some of the more technical
6 stuff somewhere else, this was something we had discussed,
7 and it seemed to be a little confusing to do that, and
8 then somebody's got to look at two different places to
9 find these, and that was one of the arguments behind why
10 you put it all in one place and why you ultimately shift
11 it to the Rules of Procedure as opposed to putting it
12 somewhere else.

13 CHAIRMAN BABCOCK: R. H.

14 MR. WALLACE: Well, that was -- my question
15 was going to be is there now or is there anticipated that
16 there will be a separate more technical user's manual type
17 thing for this type of stuff or will it all be right in
18 the rules, because the only one I'm familiar with, there
19 is a separate -- I don't know what they call it, Northern
20 District of Texas user, and it's about that thick, and
21 that's the one you give to your secretary and say, "Here,
22 learn how to do this," and but I don't know -- because
23 there's not that much in the -- certainly not in the
24 Federal rules or the local rules, but, I mean, it
25 really -- it sets out all of this stuff step-by-step how

1 to do it.

2 CHAIRMAN BABCOCK: Richard.

3 MR. MUNZINGER: I'm sympathetic to the view
4 that you don't want to have a lot of technical stuff in
5 the rules, but the back side of that is, if I understand
6 computers, and I don't, but I've always been told garbage
7 in/garbage out, so that whatever TexasOnline is getting
8 originates with me, and if my computer doesn't have 300
9 dots per inch, my ESOB and TexasOnline are not going to be
10 able to convert it from a hundred DPI to 300 DPI. It's
11 got to be 300 DPI when it leaves my machine. If that's
12 the case then in fairness to the practitioner there has to
13 be a way that you alert the practitioner to the problem
14 that whatever you file, stud, has got to be done in a
15 particular way, and it has to be done in a technical way.

16 Now, when the Fifth Circuit and the courts
17 adopted rules that said your margins have to be eight and
18 a half by eleven and font has to be so-and-so that was in
19 a -- I started practicing law when you had a typewriter
20 that didn't have multiple fonts. You had a typewriter,
21 and we all were just aghast that you could buy a little
22 ball and put a different font in there. It just blew us
23 away. It was the most modern thing you ever saw in your
24 dadgum life.

25 CHAIRMAN BABCOCK: And it became electric

1 after a while, too.

2 MR. MUNZINGER: Yeah. But, you see, my
3 point is this: The rules have adapted to meet the change
4 in technology. Our rules need to adapt to meet the change
5 in technology. You have to tell the practitioners, "The
6 appellate court will insist upon a record that is
7 electronically searchable. Make sure you do that." How
8 do I do that? Well, do we want to burden the rules with a
9 lot of technical gobbledygook? Probably not, but it ought
10 not to be too difficult to say go to -- in a comment, "Go
11 to the Supreme Court website, which will give you a list
12 of approved programs or approved devices that accomplish
13 these goals for you." Then the problem is solved. You've
14 met their problem, you've met our problem as
15 practitioners, and you've bowed to technology as you have
16 to.

17 CHAIRMAN BABCOCK: Judge Christopher.

18 HONORABLE TRACY CHRISTOPHER: I just think
19 it's a big mistake to have JP rules on electronic filing,
20 TRAP rules on electronic filing, and, you know, 40
21 different sets of county local rules on electronic filing,
22 which have little tiny variations between them. We need
23 one rule that deals with electronic filing, because the
24 state has mandated that our electronic filing goes through
25 TexasOnline, and it doesn't -- it shouldn't be in a rule

1 of procedure. I mean, we can publish it in that little
2 booklet if we want to, but it ought to be something that
3 can evolve and change with very little effort and, you
4 know, trying to shoehorn it in here, it just doesn't
5 belong there.

6 MS. PETERSON: Do you mean all the e-filing
7 in general or just the specific standards that we're
8 talking about?

9 HONORABLE TRACY CHRISTOPHER: Well, just
10 about everything starting here in 9. Okay. Like, for
11 example, they -- Angie passed out the, you know, template
12 for the local rules that like Harris County has and all
13 the other counties, which actually have changed over the
14 years, and we just got some complaint in Harris County
15 that our local rules are using an old version of the, you
16 know, template rules. Well, okay, we're not going to go
17 through the whole local rules process of getting it
18 approved all the way up the chain. I mean, if a new
19 version of these rules come out, they should come out and
20 apply to every county. And --

21 MS. PETERSON: Well, I don't -- I'm sorry.

22 HONORABLE TRACY CHRISTOPHER: And the rules
23 have this paragraph in them about how consistent with
24 standards promulgated by JCIT, TexasOnline will specify
25 the permissible formats for documents. Well, they haven't

1 done that, other than to say a PDF, and that's where the
2 problem has started and ended, because they haven't done
3 what they were supposed to do here.

4 CHAIRMAN BABCOCK: Okay. Well, I can see
5 this vote is shaping up like Texas/OU, North/South, the
6 Red Sox/Yankees, but before we vote, and we're going to
7 vote in a second, Justice Gray.

8 HONORABLE TOM GRAY: I didn't know you were
9 fixing to vote on something, so this may not fit here, but
10 you referenced while ago about the document has to be in
11 black and white. We are getting now at the Tenth Court
12 more and more briefs that have colored charts and graphs
13 and photographs, and especially if you bring criminal
14 cases into this, color photographs of victims and crime
15 scenes, and I don't know how that fits into your black and
16 white PDF files, but it is part of the changing, evolving
17 technology that we're seeing.

18 CHAIRMAN BABCOCK: Bill.

19 PROFESSOR DORSANEO: I don't know whether --
20 what you're planning on voting on.

21 CHAIRMAN BABCOCK: It's a secret.

22 PROFESSOR DORSANEO: I don't know what I
23 would have us vote on either, but I have never liked -- in
24 fact, I have detested a part of this template, and it's
25 down here in (7), (8), and (9). It's the part that says

1 if you flunk the filing process you can -- you haven't
2 filed when you transmitted to the electronic whatever,
3 entity. That's not what our rules say about paper
4 filings. They say you get another chance. You know, they
5 say that the court has to tell you what the nonconformity
6 is and you get to do -- you get a do over by a certain
7 date, and if you screw that up then you're toast.

8 I have a question for people who have been
9 working on this process. Has it happened very much that
10 people get -- file something and then the -- it's
11 unaccepted and then they're notified by this alert and
12 time is up? It's going to be less of a problem for
13 briefs, I think, frankly, but has that happened very much?

14 MR. GRIFFITH: The rejection rate on
15 electronic filings in trial courts runs somewhere around
16 three percent. Now, that includes some that actually get
17 sent to the wrong county. They select Travis and maybe
18 meant to select Tarrant, or they have filed discovery,
19 which should not be filed with the clerk, so there are
20 some reasons for those rejections, but, yes, about three
21 percent do get rejected.

22 PROFESSOR DORSANEO: Uh-huh.

23 MR. GRIFFITH: Now, if it's a reason,
24 something that they can cure, like they've got the wrong
25 cause number on the document, the clerk will send them a

1 note back on that and they can resubmit.

2 PROFESSOR DORSANEO: But time may be up.

3 MR. GRIFFITH: It may be, but in many cases
4 the clerk will work with the filer to give them credit for
5 having timely filed.

6 PROFESSOR DORSANEO: But it doesn't say
7 anything about that in any of these packages. I don't
8 like that. I would like for people to get an opportunity
9 to fix it at least one time like we have provided in
10 current 9.14(i).

11 CHAIRMAN BABCOCK: Okay.

12 PROFESSOR DORSANEO: And I think that ought
13 to be so in all of these -- all of these versions of
14 electronic filing.

15 CHAIRMAN BABCOCK: Right. Here's the vote I
16 was proposing.

17 PROFESSOR DORSANEO: Okay.

18 CHAIRMAN BABCOCK: Kennon said that she
19 would be interested in hearing what the committee had to
20 say about leaving some, obviously not including all, but
21 leaving some standards in like the 300 DPI that we see
22 here at 9.1(c)(4) and (5) as opposed to the other view,
23 which is, you know, they're mad as hell about that and
24 they won't take it anymore, so the vote would be --

25 HONORABLE TRACY CHRISTOPHER: Could I

1 suggest -- I mean, what I would like to see in the TRAP
2 rules or in the JP rules is a notation that says, "Briefs
3 must be electronically filed. See electronic filing
4 rules, separately."

5 PROFESSOR ALBRIGHT: I would second that
6 motion.

7 HONORABLE TRACY CHRISTOPHER: And then in
8 the electronic filing rules you can put as much detail as
9 you want in, and they can be updated yearly, every six
10 months.

11 CHAIRMAN BABCOCK: But not in the TRAP
12 rules?

13 PROFESSOR ALBRIGHT: And it applies to --

14 HONORABLE TRACY CHRISTOPHER: And it applies
15 to JP.

16 PROFESSOR ALBRIGHT: Trial courts.

17 HONORABLE TRACY CHRISTOPHER: Trial.

18 PROFESSOR ALBRIGHT: Appellate courts.

19 CHAIRMAN BABCOCK: Okay. Yeah, Justice
20 Bland.

21 HONORABLE JANE BLAND: And the benefit of
22 that would be that these guys wouldn't have to sit through
23 our meetings all the time when they just wanted a small
24 rule change that none of us really can speak to about what
25 would improve the electronic product.

1 CHAIRMAN BABCOCK: Are you kidding, they
2 love this. They eat this up.

3 HONORABLE JANE BLAND: Well, I'm sure they
4 don't.

5 CHAIRMAN BABCOCK: They live for this.

6 HONORABLE JANE BLAND: You know, I live for
7 this stuff, but this is pretty tedious, and so I can
8 imagine sitting in the back of the room what they must
9 think, and so, you know, we're not -- you know, we're not
10 experts on this area. I think we can debate, you know,
11 rules well. I'm not sure we are good debaters of the
12 electronic requirements other than we know when it's not
13 working right.

14 MR. HARDIN: I second Judge Christopher's
15 motion.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE TOM LAWRENCE: Can I make one --

18 PROFESSOR DORSANEO: Bruce. Bruce wants to
19 say something and then you, Judge.

20 MR. HERMES: Justice Bland woke me up there,
21 and so I did -- I wanted to share a couple of thoughts,
22 and that's that, one, if those kinds of technical issues
23 go elsewhere then perhaps this group should ask the Court
24 to specifically delegate that responsibility somewhere so
25 that it has some authority wherever else it lies. I would

1 also want to share with you, looking ahead a little bit,
2 the court reporters, one of the items that you have on the
3 agenda is the court reporters format manual. Now, it's
4 extremely detailed and technical, and it goes into the
5 binding and the cover and the colors of the ink and so
6 forth, and all of that paper-oriented language is
7 scattered all through that document, and in approaching
8 that document to get electronic copy of the court
9 reporter's record into that document we tore it to pieces
10 and then put it back together so that paper description
11 was all together and a section of electronic
12 specifications were all together, at least it was neat in
13 one place where it was easy to update. So that could be
14 another alternative approach.

15 PROFESSOR DORSANEO: Mr. Chairman?

16 CHAIRMAN BABCOCK: Yeah, Bill.

17 PROFESSOR DORSANEO: I think that's a good
18 suggestion --

19 CHAIRMAN BABCOCK: Oh, hey, wait a minute.
20 I'm sorry. Judge Lawrence, second time I've
21 gotten distracted. Judge Lawrence.

22 HONORABLE TOM LAWRENCE: Well, I think Tracy
23 made a good point. To have 40 different sets of local
24 rules dealing with e-filings, a set of JP rules, and a set
25 of appellate rules is a disservice to the practitioner

1 that may have to look at three different sets of e-filing
2 rules, slightly different. I think we need a consistent
3 set. There may be some variations for the different level
4 courts, but generally speaking I think we need one set of
5 e-filing rules that governs virtually everything so we
6 don't have these three divergent sets, and the longer we
7 go the more divergent these are going to get as we amend
8 some but not others.

9 CHAIRMAN BABCOCK: Can I ask a question?
10 Isn't it true that in every Federal judicial district
11 they've got their own --

12 MS. PETERSON: Yes.

13 CHAIRMAN BABCOCK: -- e-filing rules? I
14 mean, local rules, right? And why is that necessary?
15 Why -- and, I mean, to your point, Judge Lawrence, if
16 we're going to have statewide e-filing rules that pick up
17 JP, district court, and the appellate courts, how are we
18 going to achieve uniformity when the Federal courts, which
19 are a lot more homogeneous than our court, seem to have to
20 have -- every district seems to have different rules.

21 HONORABLE TOM LAWRENCE: Well, we've got one
22 rule-making authority, Texas Supreme Court, whereas they
23 can do whatever they want from district to district,
24 right?

25 CHAIRMAN BABCOCK: Well, sure, but the U.S.

1 Supreme Court could do the same thing if they wanted.

2 HONORABLE TOM LAWRENCE: I don't know.

3 HONORABLE TRACY CHRISTOPHER: Well, but our
4 changes have to be approved by the Supreme Court, so, I
5 mean, you know, like when we first did the e-filing rules
6 in Harris County we were told, "This is it. You approve
7 it. This is the format, you approve it, because this is
8 the only thing the Supreme Court is going to approve."

9 CHAIRMAN BABCOCK: Right.

10 HONORABLE TRACY CHRISTOPHER: So we did
11 that, you know, eight -- seven, eight years ago. Well,
12 now apparently this has been updated, but our local rules
13 are still seven, eight years ago. So, I mean, one set,
14 because it all goes through TexasOnline, is all you need.

15 CHAIRMAN BABCOCK: Yeah. I still don't know
16 why the Federal courts have different, but that's probably
17 a different issue. Okay. Somebody had their hand up.
18 Elaine.

19 PROFESSOR CARLSON: I wanted to ask Kennon,
20 do the Federal courts go through something like
21 TexasOnline, or does it go directly through the courts?

22 MR. HAMILTON: It goes through PACER.

23 MS. PETERSON: PACER, yeah, is the --

24 MR. HERMES: PACER system is administered by
25 the U.S. Administrative Office of the Courts, so it's not

1 privatized.

2 MR. HARDIN: It's not what?

3 MR. HERMES: It's not privatized.

4 PROFESSOR CARLSON: Privatized.

5 CHAIRMAN BABCOCK: Okay. Can we have a
6 vote? And the vote is everybody who is in favor of having
7 the technical requirements like searchable format,
8 300 DPI, that type of thing, in the TRAP rules, raise your
9 hand.

10 Everybody against? That vote is 17 to 4
11 against having the technical requirements in the TRAP
12 rules, so fairly decisive. Bill.

13 PROFESSOR DORSANEO: If that means that this
14 committee is not going to review the technical rules, that
15 it's going to be left to somebody else, then we're going
16 to come up with problems like we did with the court
17 reporters' manual.

18 HONORABLE SARAH DUNCAN: That's right.

19 PROFESSOR DORSANEO: In my experience, being
20 on this committee since 1982, that the best work is done
21 when it goes through the committee and that when the Court
22 relies on somebody else or does its own work there are
23 frequently --

24 HONORABLE SARAH DUNCAN: Or the Legislature.

25 PROFESSOR DORSANEO: -- problems created.

1 We create our own problems, too, certainly, but following
2 our recognized procedure usually works out better than not
3 following it.

4 CHAIRMAN BABCOCK: Let the record reflect
5 that Professor Dorsaneo's comments were meant in the
6 nicest possible way --

7 PROFESSOR DORSANEO: Yes.

8 CHAIRMAN BABCOCK: -- with respect to the
9 Court.

10 PROFESSOR DORSANEO: They were.

11 CHAIRMAN BABCOCK: Roger.

12 MR. HUGHES: I think I would like to say
13 double ditto on those remarks. What I have observed is
14 that this software and hardware rapidly evolve, but by and
15 large what is useful comes from the practitioners and the
16 advocates showing it to the court, and so I think this
17 committee could be extremely valuable in bringing all of
18 that to the attention. That's how the courts usually
19 confront it when the lawyers are going, "Golly, this is a
20 great new idea on how to prepare a brief and for you to
21 use it and cart it around," and you know, that's -- and
22 that's how we find out, so to speak, what are really
23 useful innovations and what are just geegaws.

24 CHAIRMAN BABCOCK: Great. We're going to
25 pause here after a minute, Rusty.

1 MR. HARDIN: Well, I was just going to ask,
2 for those of us who haven't had the benefit of 27 years of
3 this fun, is there any reason that this committee
4 following on that last vote couldn't follow up on what he
5 was saying, make a recommendation to the Supreme Court
6 that a -- so there is somebody responsible for getting
7 this done now rather than us just saying take it out, that
8 there be a committee, and it could be representatives of
9 this committee to be part with those of a technical
10 inclination to get it done in a manual or a set of rules
11 or so that are referred to in these rules. Is there any
12 reason, for instance, representative members of this group
13 couldn't work with the technical people appointed by the
14 Supreme Court or whatever to try to get something like
15 that done.

16 CHAIRMAN BABCOCK: Yeah, I suspect what's
17 going to happen is that the Court will take this
18 transcript and sometimes even when we have a vote of 17 to
19 4 or 19 to 1 or 27 to nothing they don't always take our
20 advice.

21 MR. HARDIN: Right, I understand. I've
22 heard that.

23 CHAIRMAN BABCOCK: So they may take our
24 advice, in which case I think they would undoubtedly
25 follow what you say, and the way it would work I think is

1 typically Justice Hecht will write me a letter and then
2 we'll appoint a group from this committee as a
3 subcommittee and then they'll come back and report.
4 That's usually how it happens.

5 HONORABLE TOM GRAY: Chip, would it be
6 inappropriate to vote on Judge Christopher's proposal that
7 they be carved out in their own -- kind of like the Rules
8 of Judicial Administration, a different part of the rule
9 book, that these are the electronic filing rules?

10 CHAIRMAN BABCOCK: I don't think it would be
11 inappropriate to vote on that, if everybody is interested
12 in voting on it.

13 MR. HARDIN: Yeah.

14 CHAIRMAN BABCOCK: That be good?

15 MR. HARDIN: Yeah.

16 CHAIRMAN BABCOCK: Okay. Everybody in favor
17 of that, raise your hand.

18 Everybody against? Three against. 17 in
19 favor, 3 against. So there's your vote. Kennon.

20 MS. PETERSON: Can I say one thing?

21 CHAIRMAN BABCOCK: Yeah.

22 MS. PETERSON: One of the concerns is how
23 long it's going to take if we go with this approach of
24 forming a separate committee --

25 CHAIRMAN BABCOCK: Yeah.

1 MS. PETERSON: -- to analyze the technical
2 requirements when there's a timeline for TAMES to go into
3 effect in September, I believe.

4 MR. HERMES: I believe it will be this fall.

5 MS. PETERSON: This fall. So there's that
6 element to consider, and --

7 CHAIRMAN BABCOCK: Yeah, Sarah.

8 HONORABLE SARAH DUNCAN: Lest we forget how
9 hard the sanctions task force worked for months and years,
10 and it came to this committee, and we rejected every
11 single thing they did. We said we shouldn't have
12 sanctions anymore basically because it's causing all this
13 satellite litigation. I think this is one of our worst
14 votes.

15 CHAIRMAN BABCOCK: Okay. Well, objection,
16 irrelevant, but --

17 HONORABLE JANE BLAND: Sustained.

18 CHAIRMAN BABCOCK: Okay. So I drove her
19 right out of the room. Okay. You know, there's no
20 question, no question, but what that is one way to do it,
21 and might be a good way to do it. There may be other
22 reasons that the Court is aware of that we're not that
23 they don't want to do it that way, but they have the
24 benefit of our thoughts and discussion about it. Yeah,
25 Alex.

1 PROFESSOR ALBRIGHT: Well, I would suggest
2 there's been a lot of work on it.

3 CHAIRMAN BABCOCK: Right.

4 PROFESSOR ALBRIGHT: Whoever did this draft
5 and then we've talked about it. There's been a lot of
6 work on it, that maybe -- I don't see that just pulling
7 this out and putting it in another document is going to
8 slow things down dramatically.

9 MS. PETERSON: It shouldn't slow things down
10 dramatically, but I wouldn't want it to stop discussion
11 now if ultimately this committee is going to be reviewing
12 the provisions and approving them. I guess I'm hoping
13 that the committee will continue to review what's been
14 drafted.

15 CHAIRMAN BABCOCK: Oh, yeah. Yeah. We're
16 going to, I said, pause at 9.2(c) and we'll take it up
17 again tomorrow morning, but in the meantime, Judge
18 Lawrence, who has another commitment tomorrow, wants to
19 talk about Texas Rules of Civil Procedure 556 and 557,
20 which is Tab 6 or Item 6 on the proposed agenda.

21 HONORABLE TOM LAWRENCE: 556 deals with a
22 judgment upon a jury verdict, and that would not be
23 changed. 557 deals with a case tried by the JP. Now,
24 these are JP rules. The way it -- the wording is now the
25 JP is supposed to render the verdict immediately upon the

1 conclusion of the trial, cannot take the case under
2 advisement for any reason, and I knew this rule was here,
3 but most JPs from time to time take cases under advisement
4 because you have so many pro ses that raise issues that
5 you might need to go and research, so it's a fairly common
6 practice, but I found out in February that the Texas
7 Commission on Judicial Conduct had sanctioned a JP at some
8 point in the past, probably a private, because I had never
9 heard about it because that JP had taken a case under
10 advisement and hadn't rendered a judgment on the spot.

11 I can't believe that they did that, but they
12 did, and I would like to propose this language in 557 so
13 that that doesn't happen again, and basically it would be
14 that if the justice renders the decision immediately then
15 he shall announce -- in the second sentence I've got a
16 gender issue there. Instead of "announce his" it should
17 be "announce the decision in open court, note the same in
18 the court's docket," period. "If the justice takes the
19 case under advisement then the justice shall render the
20 decision as promptly as practicable and note the same in
21 the court's docket and immediately notify all parties when
22 the decision is rendered." So I think that would fix the
23 problem.

24 CHAIRMAN BABCOCK: Okay. And say again what
25 happened to this JP.

1 HONORABLE TOM LAWRENCE: He got --
2 apparently he tried a case, a bench trial, did not render
3 a judgment on the spot as the rule requires him to do now,
4 took it under advisement, rendered a judgment at some
5 point in the future, and I didn't see the sanction, but I
6 was told that there was a sanction against him, probably a
7 private warning or reprimand of some type. I've never
8 seen it. Because he didn't rule immediately, because he
9 took the case under advisement, but the rule does require
10 that, so I'd like to change the rule so that doesn't
11 happen again.

12 CHAIRMAN BABCOCK: Okay. Richard.

13 MR. MUNZINGER: Is there any reason to
14 specify the form of notice so that notice -- notify in
15 writing or notify in some specific way?

16 HONORABLE TOM LAWRENCE: Well, I guess we
17 could. You've got a 10-day time to appeal, and so I
18 would -- in writing you're going to eat up several days
19 with that. I mean, I don't have any strong feelings one
20 way or the other. I was just trying to -- by use of the
21 term "immediately" I was trying to get at the quickest
22 possible way because you've got this short 10-day time
23 period to appeal.

24 MR. MUNZINGER: Well, the form of judgment
25 in the justice court can be a notation on the docket, or

1 is it a requirement there be a written judgment?

2 HONORABLE TOM LAWRENCE: No, it can be a
3 notation on the court's docket or it can be a formal
4 written judgment.

5 MR. MUNZINGER: So the question arises when
6 was judgment entered and when was I told that judgment was
7 entered for purposes of an appeal or otherwise.

8 HONORABLE TOM LAWRENCE: Well, most of the
9 language for the JP court judgments talk in terms of when
10 the judgment was signed, is the language that is used.
11 Now, I know that we don't like signed on this committee,
12 we use rendered, I think --

13 PROFESSOR CARLSON: We like signed.

14 HONORABLE TOM LAWRENCE: No? We like
15 signed, okay.

16 HONORABLE SARAH DUNCAN: Just the opposite.
17 Everything is signed.

18 HONORABLE TOM LAWRENCE: Most of the
19 language is signed with those judgments, but I wouldn't --
20 because the 557 doesn't address that issue, I wouldn't try
21 to complicate it by bringing something else into it.

22 MR. MUNZINGER: But there's no other rule
23 that addresses the question of giving notice that a
24 judgment has been entered so that the time limits have
25 begun?

1 HONORABLE TOM LAWRENCE: No.

2 MR. MUNZINGER: And that's my issue.

3 CHAIRMAN BABCOCK: Could you add "and the
4 date thereof"?

5 MR. MUNZINGER: In specifying the form of
6 notice and I don't -- I would assume that the justice of
7 the peace knows the addresses of the parties before him or
8 her and could give written notice to them, but --

9 HONORABLE TOM LAWRENCE: You would, but you
10 would want to try to call them if you could, so that you
11 give them as much time as possible because of the 10-day
12 appeal period.

13 MR. MUNZINGER: And I agree with that as
14 well. All I'm saying is there is no vehicle in here for
15 notice or requirement establishing that notice was given,
16 which I think could be a problem of "You never told me."

17 HONORABLE TOM LAWRENCE: Well, there --
18 well, there's -- I guess there's nothing in the rules now
19 because now it requires you to do it in open court, so I
20 guess it's not contemplated in the rules currently.

21 CHAIRMAN BABCOCK: Yeah, Frank.

22 MR. GILSTRAP: You know, 557 really doesn't
23 say that you have to do it immediately. It says you have
24 to do it in open court. I think the idea was that's where
25 they want the JP -- they want the JP to come into court

1 and announce his ruling, but it doesn't say you can't wait
2 a few days to do it. That may have been how it was
3 interpreted.

4 HONORABLE TOM LAWRENCE: Well, that's how it
5 was interpreted. I'm trying to prevent that result again.

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: Judge Lawrence, I think
8 Rule 567 says that the new trial can be granted within 10
9 days after rendition of judgment. That's what I'm
10 reading.

11 HONORABLE TOM LAWRENCE: Okay.

12 PROFESSOR CARLSON: So does that satisfy you
13 at all?

14 MR. MUNZINGER: Me?

15 PROFESSOR CARLSON: Yeah.

16 MR. MUNZINGER: The time limit is fine.
17 It's just that there's -- if he renders the judgment but
18 he doesn't do it in open court now, he does it three days
19 after he's given serious and good faith thought to it and
20 decides he enters judgment. He goes to the docket book
21 and writes down "judgment for Babcock," signs his name.
22 Now the question comes up who and when did he notify that
23 the judgment was entered and that person's rights have
24 been affected because the time limit begins, and there is
25 nothing in the rule that says the justice shall give

1 notice in a particular way, and there's nothing in the
2 rule that says how you can verify that notice was given,
3 and it's because there has never been such a requirement
4 before because the rule has on its face at least
5 inferentially contemplated that judgment would be entered
6 in open court in front of the parties. Now, you've got a
7 different problem.

8 CHAIRMAN BABCOCK: Richard, what if it said,
9 "If the justice takes the case," et cetera, et cetera, et
10 cetera, "and immediately notify all parties when the
11 decision is rendered and the date thereof," period. "The
12 date and method of notice shall be noted in the court's
13 docket."

14 MR. MUNZINGER: That's fine.

15 CHAIRMAN BABCOCK: Does that solve your
16 problem?

17 MR. MUNZINGER: It helps.

18 CHAIRMAN BABCOCK: You're never satisfied.
19 Carl.

20 MR. HAMILTON: Well, I think that the rule
21 means what it says, that the -- either the jury makes the
22 decision on the facts and promptly returns its verdict and
23 the judge enters the judgment right then, or if the judge
24 is the trier of fact, he enters it right then, because in
25 JP court you want a quick, inexpensive decision, and I

1 don't think we want JPs taking it under advisement and
2 maybe a month or two later you get a decision out of it.

3 HONORABLE TOM LAWRENCE: Well, you
4 frequently have pro ses that raise some issue not
5 contemplated by the pleadings or the answer that the judge
6 is going to have to go back and look up the law because
7 they're not going to brief it. They don't know how to
8 brief it, and the judge is responsible for trying to
9 render the best decision, so he's going to have to go back
10 and look this up, and he's not going to have time to do it
11 then because he's got 30 more people waiting that day, so
12 it's going to have to be done later. So, you know, I'd
13 like to avoid having to render a decision on the spot that
14 may not be accurate or right when you can take a few days
15 or whatever it takes to get a good judgment. I mean, why
16 should the JP courts be any different than a county or
17 district court that takes a case under advisement?

18 CHAIRMAN BABCOCK: Okay. Any other
19 comments? Yeah, Justice Gray.

20 HONORABLE TOM GRAY: Why couldn't you in
21 effect recess the trial, not render judgment, set it for a
22 date certain in the future for the parties to come back,
23 JP has done his homework, renders judgment?

24 HONORABLE TOM LAWRENCE: Well, you could do
25 that, but I guess you would want to try to avoid dragging

1 people back down again for something that really may only
2 require a search of the statutes.

3 HONORABLE TOM GRAY: Which I think goes back
4 to Richard and Carl's point that you're bringing in a
5 whole new problem of notice and timing and the need for
6 speed, and either you do it while everybody is there or
7 you get everybody back and tell them what it is. I just
8 don't see the need for the fix, I guess. I mean, because
9 it seems to me to be an easier to way to fix it, and
10 that's just if there's a question open, the trial's not
11 over, recess it until it is.

12 HONORABLE TOM LAWRENCE: Well, that would
13 seem to be an inconvenience to the public to me to have to
14 bring them back down there again when it may not be
15 necessary.

16 CHAIRMAN BABCOCK: Okay. Any other
17 comments? Yeah, Richard.

18 MR. MUNZINGER: The rule as presently
19 written without your change, tell me if I'm reading it
20 correctly, "When the case has been tried by the justice
21 without a jury he shall announce his decision in open
22 court and note the same in his docket," period. That's
23 the way the rule reads at the present time.

24 HONORABLE TOM LAWRENCE: That's correct.

25 MR. MUNZINGER: You know, personally, I

1 think that the rule, if there was a sanction to a judge
2 who took a judgment -- a matter under advisement, that the
3 committee ought to be sanctioned that sanctioned him. The
4 rule itself contemplates entering a judgment in open
5 court. It doesn't say anything about it has to be
6 immediate and that there can't be due consideration given
7 to the facts and the law. It says if you're going to
8 render judgment, render it in open court, and that's why
9 there's no need for notice.

10 HONORABLE TOM LAWRENCE: Well --

11 MR. MUNZINGER: It contemplates the very
12 thing that was said there. "We're going to adjourn this
13 case and come back in three days and I'll tell you what
14 I'm going to do." The rule itself doesn't -- what you
15 need is a new justice commission.

16 CHAIRMAN BABCOCK: Now, now.

17 MR. MUNZINGER: I've had that thought
18 before.

19 HONORABLE TOM LAWRENCE: Well, I'm not --
20 you know, I'm not going to argue about that, but I'm just
21 trying to fix something that's --

22 CHAIRMAN BABCOCK: Wait a minute, aren't you
23 on that committee?

24 HONORABLE TOM LAWRENCE: Yeah, I am, but I
25 don't want to argue about that. I'm just trying to fix

1 something that's been a problem so it's not going to be a
2 problem again, because I think that was an unfair result.

3 CHAIRMAN BABCOCK: Okay. All right. So the
4 issue is fairly articulated. How many would -- Judge
5 Lawrence, would you accept my friendly amendments to --

6 HONORABLE TOM LAWRENCE: Sure.

7 CHAIRMAN BABCOCK: -- cure Richard's
8 problem? How many people are in favor of the fix to 557
9 with my suggestions added to it?

10 MR. DUGGINS: One question. Is the
11 alternative to leave it as-is?

12 CHAIRMAN BABCOCK: Yes.

13 MR. HAMILTON: What is your suggestion?

14 CHAIRMAN BABCOCK: I said that we should add
15 a couple of phrases at the end. Let me tell you how the
16 whole thing would read now. The new language would be "If
17 the justice takes the case under advisement then the
18 justice shall render a decision as promptly as practicable
19 and note the same in the court's docket and immediately
20 notify all parties when the decision is rendered and the
21 date thereof," period. "The date and method of the notice
22 shall be noted in the court's docket," period.

23 Okay. Everybody in favor of that raise your
24 hand.

25 Everybody against? That carries by a vote

1 of 14 to 3, and I've had as much fun as I can stand for
2 today, so we'll see you-all tomorrow at 9:00 o'clock, and
3 we will take up at Rule 9.2 of the TRAP rules, the
4 proposed amendments. Thanks, everybody.

5 (Meeting recessed at 5:01 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17h day of April, 2009, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$_____.

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